

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

UNITED STATES OF AMERICA ) CAUSE NO. 3:10-CR-308-P (1)  
(  
vs. )  
( AUGUST 15, 2012  
) DALLAS, TEXAS  
MICHAEL MUSACCHIO ( 9:00 A.M.

HEARING ON MOTION TO SUPPRESS  
HEARING ON MOTIONS IN LIMINE

BEFORE THE HONORABLE JORGE A. SOLIS  
UNITED STATES DISTRICT JUDGE

SHAWN M. McROBERTS, RMR, CRR  
1100 COMMERCE STREET, RM. 1654  
DALLAS, TEXAS 75242  
(214) 753-2349

A P P E A R A N C E S

FOR THE GOVERNMENT: UNITED STATES ATTORNEY'S OFFICE  
1100 COMMERCE, 3RD FLOOR  
DALLAS, TEXAS 75242  
(214) 659-8600  
BY: MS. LINDA GROVES

FOR THE DEFENDANT: UNITED STATES ATTORNEY'S OFFICE  
1301 NEW YORK AVENUE NW  
SUITE 600  
WASHINGTON, DC 20005  
(202) 616-3475  
BY: MR. RICHARD GREEN

FOR THE DEFENDANT: LAW OFFICES Of JAY ETHINGTON  
3131 MCKINNEY AVENUE, SUITE 800  
Dallas, TEXAS 75204  
(214) 740-9955  
BY: MR. JAY ETHINGTON  
MR. REID MANNING  
MR. BILL DUNNE

OFFICIAL COURT REPORTER: SHAWN M. McROBERTS, RMR, CRR  
1100 COMMERCE STREET, RM. 1654  
DALLAS, TEXAS 75242  
(214) 753-2349

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1 THE COURT: Good morning.

2 All right. Call this case on the Defendant's motion to  
3 suppress, the Defendant's motion for a *Daubert* hearing, and  
4 various motions in limine.

5 Is the Government ready?

6 MS. GROVES: The Government is ready.

7 THE COURT: Mr. Ethington?

8 MR. ETHINGTON: Yes, Your Honor.

9 THE COURT: Why don't we start off with the motion  
10 to suppress, and you may proceed.

11 MR. ETHINGTON: May I introduce people in the  
12 courtroom here with us.

13 THE COURT: Yes.

14 MR. ETHINGTON: This is Reid Manning. He got his  
15 law license a few months ago and is working in our office.  
16 And Bill Dunne has been practicing for some time, and he had  
17 represented Mr. Musacchio in the civil matter along with Henry  
18 Simpson, who practices -- All of these people are admitted to  
19 this Court. And Mr. Simpson was primarily responsible for the  
20 representation in the civil case that preceded this criminal  
21 case for Mr. Musacchio. That is who we have here.

22 THE COURT: Thank you.

23 All right. Mr. Ethington, you may proceed.

24 MR. ETHINGTON: Your Honor, we would call as our  
25 witness in the motion to suppress Agent Allyn Lynd.

1 MR. GREEN: Objection, Your Honor. We have no  
2 notice from Mr. Ethington as to who he is calling. We have  
3 asked several times as to who he is calling. I would ask for  
4 an offer of proof as to what he intends to use Agent Lynn for.

5 MR. ETHINGTON: Judge, he is the case agent, and he  
6 is going to testify in the -- He has been designated as an  
7 expert witness and he is going to testify in further  
8 proceedings. There is no surprise here.

9 THE COURT: You are calling him on your motion to  
10 suppress?

11 MR. ETHINGTON: Yes.

12 THE COURT: Agent, if you would come around and take  
13 the witness stand, please, sir.

14 (Whereupon, the oath was administered by the Court.)

15 ALLYN LYND,

16 Testified on direct examination by Mr. Ethington as follows:

17 Q. Agent Lynd, we all know and respect who you are and what  
18 your position is, but for the record purposes tell us your  
19 full name?

20 A. Yes, sir. It is Special Agent Allyn Lynd--L-Y-N-D. I  
21 have been with the FBI about a little over 16 years now, and I  
22 have been on the Cyber Squad for about 15.

23 Q. Very good. And you are the case agent in this United  
24 States versus Musacchio and others?

25 A. I am, sir.

1 Q. And have been from the inception of the case, I take it?

2 A. Yes, sir, I have.

3 Q. Okay. And case agent, just for record purposes, is  
4 primarily responsible for coordinating investigation, making  
5 some management decisions, and charged with the knowledge,  
6 generally speaking, of the investigative activities in the  
7 case. Is that right?

8 A. With everything except for the management decision. That  
9 is generally our supervisor. But as far as the investigation  
10 itself, operationally, tactically, yes.

11 Q. And, of course, those decisions are also made by -- in  
12 conjunction with the U.S. Attorney's Office?

13 A. Yes, sir.

14 Q. Okay. And very briefly, if you would, because again, I  
15 think we all know your background, but just for record  
16 purposes, what is your training or experience in the  
17 investigation of what you call Cyber Crimes?

18 A. I have -- A lot of OJT, obviously, for the last 15 years.  
19 I have taken all the courses that the Bureau provides in it.  
20 I have taken some outside training with FTK, some other  
21 software venders. I have attended log analysis. I have  
22 attended classes on wireless hacking wireless hackers,  
23 analysis of router logs. I have certifications from CompTIA,  
24 who is one of the certification authorities; other things  
25 along the same lines, sir.

1 MR. GREEN: Your Honor, the Government will  
2 stipulate that Agent Lynd is an expert, if that is where  
3 Mr. Ethington is going.

4 MR. ETHINGTON: That is not where I am going, Your  
5 Honor; just some general background of what his experience is.

6 THE COURT: All right.

7 Q. (BY MR. ETHINGTON) Can you tell us, please, whether or  
8 not you are familiar with the procedures that the FBI has for  
9 the identification, collection of what I will call  
10 electronically stored information?

11 A. In general, yes, sir. With regards to certain specific  
12 things, no; but in general, yes.

13 Q. Are there protocols, guidelines, or requirements for the  
14 collection of evidence on behalf of the FBI in criminal cases?

15 A. In general, yes, sir.

16 Q. And what are they?

17 A. I will -- Again, it is going to depend on the  
18 particulars. That is why I was saying there were some cases  
19 where I wouldn't know. But, for example, if we are going to  
20 go to a search warrant, we would obtain a search warrant, we  
21 would go to the site where we are going to execute the search  
22 warrant, we would inform the individuals there, and we would  
23 either have an evidence collection team or somebody designated  
24 as the evidence collectors, and they would collect those  
25 things that the warrant authorized us to take.

1 Q. You say evidence collectors. Are they instructed or  
2 trained on the proper way to acquire electronically stored  
3 information?

4 A. They are familiar with them, yes, sir.

5 Q. Okay. So there are some guidelines or suggestions on how  
6 to do it properly?

7 A. Again, sir, in general, there are some specific  
8 instances. For example, if the information is across a  
9 network and it is not stored locally, there becomes some  
10 different questions on whether there are guidelines or  
11 procedures are not, so I don't want to give you a blanket yes.  
12 But for the most common types of electronic storage evidence,  
13 yes.

14 Q. Well, let's take, for example--and it may apply to this  
15 case, then, factually--if you have a search warrant that the  
16 Judge has issued for a business office --

17 A. Yes, sir.

18 Q. All right. And so this business office is populated by,  
19 let's say, 10 or 15 employees or supervisors and employees,  
20 and they have workstations, and each workstation has some  
21 computer terminals or -- What do you call them? Desktops.  
22 And also the peripheral equipment I guess that goes with that,  
23 and a server maybe stationed in some storage room or something  
24 like that.

25 A. If it is all on-site, yes, sir.



1 Q. Well, of course, if it is connected by the internet  
2 through some off-site server, that might be also a place of  
3 interest?

4 A. Yes, sir. But, again, there is different procedures for  
5 that, and not everybody will have been trained on that. In  
6 addition, there is some questions on if it is a Rule 21 search  
7 warrant, do we have permission to go to the other place.  
8 There is a lot of things that have to get worked out if it was  
9 not covered physically in that space. That is why I am trying  
10 to not say an absolute answer on one thing, sir.

11 Q. And in preparation for the execution of this search  
12 warrant, quite often, or almost all the time, I guess, is some  
13 chart or diagram drawn of the floorplan of the premises that  
14 you are going to search so that you can identify individual  
15 computers belonging to individual offices and that sort of  
16 thing?

17 A. It wouldn't be prior to. It would be concurrent with the  
18 execution of the search warrant.

19 Q. Okay. If you had prior information, though--somebody  
20 told you, "I am a member of that staff, and here is where Joe  
21 and Ralph and Frank all office"--do sometimes you draw diagram  
22 so you will know before going into the premises --

23 A. We might, sir. But generally we actually would do it  
24 when we get there, because often people's information they  
25 give us is not accurate with what we actually find.

1 Q. And the purpose of drawing the diagram of the location of  
2 these different computers is so that you can establish a chain  
3 of custody. Is that true?

4 A. No. The chain of custody is established by taking it,  
5 but the purpose is to identify where they came from;  
6 physically be able to put back that that device came out of  
7 Room, A, B, C, or D.

8 Q. And when you enter on a business premises, are labels  
9 attached to the computer devices so that they can be  
10 identified?

11 A. It might be on the packaging around the device. The  
12 device -- It might not be on the device itself. It depends on  
13 the size of the device, the kind of device it is. But labels  
14 are attached. It may not be directly to the device. It may  
15 be the packaging.

16 Q. And then photographs are taken of each individual device  
17 and the peripheral equipment around it. Isn't that true?

18 A. You may have more than one device in a picture, so I  
19 don't want to say each individual device, but pictures are  
20 taken of everything they that we take, yes, sir.

21 Q. And the purpose of that is so that there is no question  
22 that this computer was sitting in front of the court reporter,  
23 or in the court reporter's workstation, for example. Is that  
24 right?

25 A. To try and eliminate the questions of that, yes, sir. I

1     won't say there is never any question, but to try to eliminate  
2     those questions.

3     Q.    And the purpose is to build and preserve the identity of  
4     the machine, there is the labeling on it, and location of it,  
5     and that sort of thing?

6     A.    In general, yes, sir.

7     Q.    And then, tell the Judge, after a survey is done and it  
8     is memorialized, either with a diagram and/or maybe  
9     photographs, what do the evidence seizure personnel do next?

10    A.    Generally leave a receipt with a representative who is  
11    there, or if there is nobody there, leave a receipt at the  
12    building, and transport it to our evidence storage facility.

13    Q.    Agent Lynd, it is important as to what information is  
14    contained on the instruments or the machines, computers, that  
15    you are looking for, isn't it?

16    A.    I am sorry. Say that again. I didn't catch it.

17    Q.    It is important to seize and secure the information that  
18    is on each individual computer. Isn't that true?

19    A.    Well, the taking of the information is different than the  
20    taking of the devices, so, I mean, we are talking two  
21    different procedures there, so I am not sure what you are --

22    Q.    Please help me understand.

23    A.    Once you have a -- You could be doing it one of two ways.  
24    If, for example, the business is one that we have been  
25    directed to allow the business to continue operating and all

1 we are doing is taking the information and not taking the  
2 physical device, then we would have somebody like one of our  
3 CFL members, or a specially trained technician who is  
4 authorized to make digital copies of the device, go in, make a  
5 digital copy, either while it was running or turn it off and  
6 make a copy of it, called an image, generally, and then we  
7 would take that image. We would never touch the actual  
8 device. So when you are saying the data, we may not take the  
9 device. We may just take the data from the device.

10 Q. And in some cases the device is actually taken, and other  
11 cases just the data is downloaded and taken. Is that right?

12 A. I would say copied. I wouldn't necessarily say  
13 downloaded. There is two different connotations there, but  
14 yes, sir.

15 Q. Okay. I will apologize ahead of time. I am not that  
16 familiar with the nuances of all these computer terms.

17 A. Yes, sir.

18 Q. So if I use a word or a phrase or some concept that isn't  
19 accurate, just say so and we will work through it. Okay?

20 A. Yes, sir.

21 Q. Is it important, when you enter the premises, to make  
22 sure that the personnel, the civilians that are there, not  
23 touch the computers or, I will say, monkey with the computers,  
24 when you are trying to secure the premises and get the  
25 information?

1 A. When we get into a place like that, generally we don't  
2 let people in, so I am not sure. I mean, we are doing that  
3 more for our safety of the agents. And we don't want them to  
4 touch those, but the people are really being kept out of the  
5 way because we don't want there to be any misunderstandings  
6 between individuals. We don't want anybody to think they  
7 might be going for a weapon or something like that or doing  
8 something like that. I mean, we do also do it because we  
9 don't want them potentially changing evidence, but it is more  
10 for the safety of everybody.

11 Q. Okay. But there is some concern about if you enter a  
12 business premises, announce that you have a search warrant,  
13 there would be some concern about somebody in the back office  
14 there hitting delete. That is the only phrase I know.  
15 Altering the evidence. Is that true?

16 MR. GREEN: Your Honor, at this time I have to  
17 object. Mr. Ethington is asking Agent Lynd all about search  
18 warrants. There was no search warrant in this case.

19 MR. ETHINGTON: There was.

20 THE COURT: Well, the concern I am having, though,  
21 Mr. Ethington, is what you are asking about doesn't appear to  
22 have anything to do with the issues you have raised in your  
23 motion to suppress. You don't mention a search warrant in the  
24 motion to suppress, you don't challenge the validity of any of  
25 that, so I am not sure where you are going with all this.

1           And you need to do it quicker. If there is some method  
2           to it -- You spent almost ten minutes on this preliminary  
3           stuff, and we haven't got anywhere yet.

4           MR. ETHINGTON: Judge, I just wanted to establish as  
5           quickly as I could, and I don't have all the expertise --

6           THE COURT: Well, this isn't a discovery hearing,  
7           counsel, and we just need to get to the issues you have raised  
8           in your motion to suppress and let's get to that.

9           MR. ETHINGTON: Judge, the issue in the motion to  
10          suppress, as the Court well knows, is that there was a  
11          tainting of that evidence because these procedures --

12          THE COURT: An alleged tainting of evidence, yes.

13          MR. ETHINGTON: That these procedures that are the  
14          common practice of the FBI to preserve evidence were not  
15          followed in this case, and that is my point I am trying to  
16          establish.

17          MR. GREEN: If I may, Your Honor, the FBI didn't  
18          collect the original evidence in this case, so the FBI  
19          procedures are irrelevant to this.

20          THE COURT: My understanding of the pleadings that  
21          have been filed, there is no allegation that the Government  
22          was involved. You have identified some private entities that  
23          were involved in doing the imaging, the forensic examination,  
24          and perhaps the tainting. I know there are some allegations  
25          of tainting. But you have not identified anything that the

1 Government did or didn't do.

2 MR. ETHINGTON: No, Your Honor.

3 THE COURT: So why is this relevant, then?

4 MR. ETHINGTON: So that the groundwork is laid to  
5 show what the proper way to do something is.

6 THE COURT: That is the FBI, that is the way they do  
7 it. I want to know what the other persons did. I will let  
8 you go another two or three minutes. You are just taking too  
9 long to get where you are going.

10 Q. (BY MR. ETHINGTON) Is it FBI procedure that the evidence  
11 to ensure that it is not tainted be preserved and there are  
12 certain strict procedures that you go through in acquiring  
13 electronic evidence?

14 A. There is guidelines. I won't say procedures, because  
15 each time you may find different things, like the Macintosh  
16 may be different than a Windows machines, so there are  
17 guidelines.

18 Q. Is there a guideline -- Do you know if those guidelines  
19 in the acquisition of evidence in a criminal case are  
20 different than the acquisition of evidence by the private  
21 sector in civil cases?

22 A. I don't know what people do in civil cases. I am only  
23 familiar with what the FBI does on the acquisition of  
24 evidence.

25 Q. But you are familiar with the procedures that were done

1 in this case that you are the case agent.

2 A. I am familiar with what I was told by Mr. Gorgal and  
3 Mr. Cowen they did, yes.

4 Q. Okay. Is it important to preserve the evidence in a  
5 forensically clean, I guess, mirror image of the contents of a  
6 hard drive on a computer --

7 A. Yes.

8 Q. -- for investigative purposes?

9 A. Yes.

10 Q. Okay. Do you know -- Let's direct our attention to Exel  
11 Communications, that company. That is a company that is part  
12 of this case. Do you know how the evidence that you have  
13 acquired from Exel, how that was originally acquired by  
14 private personnel?

15 A. Again, I am just repeating what I was told. I wasn't  
16 physically there. But what I was told occurred was that  
17 Mr. Gorgal, for the most part, and I think Mr. Loper on four  
18 of the computers, Mr. Gorgal showed up on scene first in  
19 Dallas where he used a combination of various forensically  
20 authenticated tools--Paraben, SMART, and EnCase--to make  
21 images. He then proceeded to Memphis where he did most of --  
22 in fact, all except for four, again, images, did the same  
23 thing for those, and then Mr. Loper did four of those, and I  
24 can't remember which tool Mr. Loper used.

25 Q. And then was that evidence ultimately turned over to you?



1 A. Yes, sir.

2 Q. Do you know where it was before -- or how it was stored  
3 and who handled it before it was turned over to you?

4 A. They reported to me that it was inside their evidence  
5 room at their office. The first time I physically had  
6 possession of it, they brought it to the RCFL and turned it  
7 over to me at our RFCL.

8 Q. And for the record, that R --

9 A. Regional computer forensic laboratory.

10 Q. The RCFL acronym, I guess, that you are using, that is  
11 the FBI lab, computer lab here in this area?

12 A. The FBI participates in the lab. It is an independent  
13 lab. But the regional computer forensic lab includes a lot of  
14 law enforcement, and so on, also. That is not FBI. So it is  
15 not an FBI lab. We are participants in it, but it is not our  
16 lab.

17 Q. All right. Did you determine from the acquisition of the  
18 evidence, or receiving it from wherever you got it, that a law  
19 firm had accessed these computers that were of interest to you  
20 way early on in preparation or investigation of a civil case?

21 A. No, sir.

22 Q. You know from your investigation that Strasburger &  
23 Price, a law firm here in Dallas, and Fish Richardson, they  
24 had examined the electronic evidence prior to you getting it?

25 A. Not the way you phrased it, sir. When you take the

1 original image, that becomes your best evidence. Then you  
2 make working copies of those and look at the working copies.  
3 And what I have been told is they examined the working copies  
4 of those; not the actual ones that were turned over to us.

5 Q. So my question is, the electronic evidence that you have  
6 got in your case that relates to Exel --

7 A. Yes, sir.

8 Q. -- when was that mirror imaged?

9 A. In 2006, starting in February--I can't remember the exact  
10 date; mid February--and continuing on through April, I think  
11 the 4th-ish. It might have been the 5th; around that time  
12 period.

13 Q. And you told us that the law firms examined this  
14 evidence--that is accessed it and --

15 A. No, sir. That is what I am saying. Once these images  
16 are made, they were not examined again. These images were  
17 then copied in turn, same as we provided you a copy of them  
18 for your discovery. The originals were not looked at. The  
19 copies of the originals were looked at.

20 Q. Okay. Now, directing your attention to before the images  
21 were made in February of 2006, I guess.

22 A. Around there, yes, sir.

23 Q. Okay. Did you determine that two law firms, at least,  
24 had examined this electronic information prior to the imaging  
25 of it that you had the benefit of so that they could determine

1 if it would be justified to image it, you see?

2 A. I am not aware that that occurred, sir.

3 Q. Have you inquired about that? What I am getting at is  
4 this. You have got mirror images of computer contents.

5 A. Yes, sir.

6 Q. And before those mirror images were made, was it of  
7 concern to you what had been done with that electronic  
8 evidence beforehand; before it was imaged?

9 A. I am not sure I am tracking, but let me see if I am  
10 understanding what you are saying. You are asking me if I am  
11 concerned about what happened with those computers before  
12 copies were made by the firm that provided them to us?

13 Q. Yes.

14 A. Okay. Sir, whatever was done with those computers before  
15 that, what would have been done by the internal employees at  
16 Exel I would not be concerned with, because they explained  
17 what they did in terms of doing that. They told us  
18 effectively--and I am summarizing--that they had had somebody  
19 come in and look at the PBX system to see if there had been  
20 some phone tampering. They were unable to determine if there  
21 was. They didn't think there was. So they hired another  
22 expert firm, which was G-C Partners, and then G-C Partners  
23 started looking at it.

24 They didn't tell us anything about any kind of -- the law  
25 firms reviewing it in between then. The first that we know

1 about it is in between those two times that the computers  
2 continued on doing their normal business, and then G-C  
3 Partners were the first ones to examine that.

4 Q. Okay. Agent Lynd, from your examination of the early  
5 history, I will call it, of this electronic evidence, did  
6 you -- In either interviewing people or reviewing emails or  
7 other correspondence, did you determine that at first there  
8 was internal searching or analysis of this electronic data by  
9 company employees of Exel; and then after that a review or  
10 examination by a law firm of not the mirror images but the raw  
11 data; and then after the law firm reviewed it, it was decided  
12 to hire the outside consultants to come in and mirror image  
13 it? Did you determine that in your investigation?

14 MR. GREEN: Objection, Your Honor. I can't even  
15 follow that question. It was a compound question. I ask  
16 counsel if he could break it down into smaller chunks so the  
17 witness can understand it.

18 THE COURT: Did you understand the question, Agent.

19 THE WITNESS: I am not sure, sir, but I will do my  
20 best to attempt to answer it.

21 THE COURT: All right. Go ahead.

22 THE WITNESS: That is not what I have been told or  
23 what is suggested to me about what is on there. Yes, internal  
24 company employees did look to see if they could find what was  
25 going on with their company, but they are not looking, from

1     what I can tell, at the same portions of the computer that  
2     were eventually examined by G-C Partners. In particular, the  
3     Outlook Web Access logs, which are part of the IIS logs, do  
4     not appear to have been examined prior to G-C Partners showing  
5     up.

6             MR. ETHINGTON: Good. I think that answers it,  
7     Judge.

8             THE COURT: Okay.

9     Q.     (BY MR. ETHINGTON) Then let's turn our attention to  
10    another company that was also involved in the civil suit and  
11    would be part of the investigation of the criminal case that  
12    we are here today on, and that is another company called TTS.

13    A.     Yes, sir.

14    Q.     Did you receive electronically stored information from  
15    representatives of TTS?

16    A.     I received two different things from that. And when you  
17    say from TTS, I need to clarify because some I got from  
18    representatives of the Court and not representatives of TTS.

19             There was a TRO which constituted imaging of the  
20    computers at TTS, and that was directed by the Court and Andy  
21    Rosen from the firm ASR Data did that. And I actually got  
22    those from Andy Rosen. Thompson & Knight, who represented TTS  
23    at the time, also had a separate outside forensic firm,  
24    Alvarez and Marsal, do some review of the digital evidence,  
25    and I received from them some of their review and eventually,

1 actually fairly shortly ago, some original back-up tapes,  
2 which nobody had known had been preserved by this forensic  
3 firm until a few months ago.

4 Q. Did you determine that this electronic evidence at TTS  
5 had been reviewed, accessed, reviewed, by associates and  
6 partners of Thompson & Knight in conjunction with employees of  
7 TTS?

8 MR. GREEN: Objection, Your Honor. Mr. Ethington's  
9 motion goes to tainting by G-C Partners; not by ASR data. Now  
10 we are in a different totally area that is not even  
11 anticipated by his motion, and I would object to this line of  
12 questioning.

13 THE COURT: Mr. Ethington?

14 MR. ETHINGTON: I am sorry, Your Honor?

15 THE COURT: His objection, response to that?

16 MR. ETHINGTON: This is all part of one big picture,  
17 Your Honor. May I ask that the elmo be turned on?

18 THE COURT: Sure.

19 MR. ETHINGTON: May I approach the witness?

20 THE COURT: Yes.

21 MS. GROVES: May I see it?

22 Q. (BY MR. ETHINGTON) Agent Lynd, I have handed you a  
23 diagram, and you will see different entities depicted there.  
24 And I will ask you, is Exel up in the left hand corner, is  
25 that the entity -- Does that represent the entity that we

1     talked about earlier, that company?

2     A.    I didn't draw this so I am not sure, but I assume so.

3     Q.    And on the right side, TTS, that is the other entity we  
4     have talked about?

5     A.    That is the other entity that was in the civil suit, yes,  
6     sir.

7     Q.    And then you are familiar with the controversy  
8     surrounding a separate lawsuit that is Securities and Exchange  
9     Commission versus Randall?

10    A.    I am familiar with the allegations made by the Receiver.  
11    I am not actually familiar with the case in chief in that, but  
12    I am familiar with the allegations, yes.

13    Q.    Yeah. You have reviewed some of that. In fact, it has  
14    been the subject of some hearings here in this courthouse,  
15    hasn't it?

16    A.    What do you mean by "reviewed it"?

17    Q.    Reviewed certain documents regarding --

18    A.    Documents, yes; electronic evidence, no.

19    Q.    No, but filings and that sort of thing, to familiarize  
20    yourself with the controversy surrounding this SEC versus  
21    Randall case.

22    A.    Again, sir, I am not familiar with the case in chief. I  
23    am familiar with the allegations related to tampering. I am  
24    not familiar with the case in chief.

25    Q.    There is actually two -- There is a criminal

1 investigation regarding Mr. Gorgal and Mr. Cowen's company  
2 called G-C Partners. That is separate -- has been removed  
3 from this district. Correct?

4 A. Yes, sir.

5 Q. Okay. And then also you are familiar with G-C Partners  
6 having been contracted at one time to provide electronic data  
7 services in the Musacchio case, and this G-C Partners was  
8 contracted with the U.S. Attorney's Office.

9 A. I believe so, sir.

10 Q. Okay.

11 MR. ETHINGTON: We would offer for demonstrative  
12 purposes, Your Honor, Exhibit No. 16 for hearing, Hearing  
13 Exhibit No. 16.

14 MR. GREEN: Objection, Your Honor. It is my  
15 understanding that this is not an accurate representation of  
16 what it purports to be. If I could just voir dire the witness  
17 for one second on this exhibit?

18 THE COURT: Put that on the elmo so I can see what  
19 you are referring to.

20 And you may voir dire the witness.

21 Q. (BY MR. GREEN) Agent Lynd, you have Defendant Exhibit  
22 No. 16 in front of you, sir?

23 A. I do, sir.

24 Q. Is there any -- Based on your investigation and  
25 everything you know about this case, is G-C Partners in any



1 way connected to the collection of evidence of Total  
2 Transportation Systems?

3 A. No, sir.

4 Q. So the arrow that is connecting TTS to G-C Partners,  
5 would that be accurate?

6 A. No, sir.

7 MR. GREEN: Thank you, Your Honor. I object to the  
8 exhibit.

9 THE COURT: Mr. Ethington?

10 MR. ETHINGTON: I have a document, Your Honor, that  
11 I would like to show that establishes that connection.

12 THE COURT: Do you want to ask the witness about it?  
13 Do you want to question the witness?

14 MR. ETHINGTON: I am going to have to find that  
15 document, Your Honor. I have more documents, but this is an  
16 index of the production that was given to us in the course of  
17 this case, and it is TTS documents received. It is page -- it  
18 is 73. And it is a chronology of the events occurred  
19 regarding TTS, and it shows that Exel conducted post-audit  
20 computer system examinations, and it was performed by G-C  
21 Partners at TTS. That is the line that we are talking about  
22 here. I mean, I just didn't draw that line. I have a  
23 document to support it, if I can find it, to present to the  
24 Court.

25 MS. GROVES: Jay, could I see your document?

1 MR. ETHINGTON: May I approach the witness, Your  
2 Honor?

3 THE COURT: Hold on a second.

4 MR. ETHINGTON: May I inquire of this witness?

5 THE COURT: Yes.

6 Q. (BY MR. ETHINGTON) Are you familiar in the civil  
7 settlement of the dispute that really gives rise to this  
8 criminal case that one of the items in the settlement was that  
9 Exel would be allowed access, full access, to TTS's computers  
10 so that they could remediate, that is, determine whether or  
11 not there was any additional evidence on the TTS computers,  
12 and that G-C Partners spent two months examining TTS's  
13 computers? Are you familiar with that?

14 A. I am not familiar with that happening at the time of this  
15 collection. I am familiar with that happening five, six  
16 months after the collection already occurred and the images  
17 had been made.

18 Q. Yes.

19 A. Yes, sir.

20 Q. But G-C Partners was on-site at TTS with full run of  
21 their computer records and system --

22 A. Not during the collection.

23 Q. It shows the dates there.

24 A. That is not the collection of the evidence, sir.

25 Q. I am not talking to you about collection. I am talking

1 about mere G-C Partners access to TTS computers back in 2007.  
2 That happened, didn't it?

3 MR. GREEN: Objection, Your Honor. What counsel is  
4 trying to establish is that G-C Partners went to an audit of  
5 TTS after the data collection, which the evidence in this case  
6 was collected from TTS. It is not relevant. We are not  
7 relying on anything that happened after the data collection at  
8 TTS.

9 MR. ETHINGTON: The original objection was that this  
10 misrepresents -- there is no connection between G-C and TTS,  
11 and the witness has just established --

12 THE COURT: He is also saying it is not relevant  
13 because they are not relying on any evidence from this time  
14 frame as far as what they are relying on in their case.

15 MR. ETHINGTON: Judge, we will find in development  
16 of evidence further that there was a continuing production of  
17 records, a continuing --

18 THE COURT: Production from?

19 MR. ETHINGTON: From TTS or Exel with law firms and  
20 then the Government. And from the discovery that we have  
21 gotten, and it may be there, but it has been voluminous  
22 discovery, I don't know when the Government got the TTS  
23 servers, for instance. It is probably buried somewhere in the  
24 discovery that has been given to me. But if it is after  
25 October or November of 2007, then the issue comes as to

1     whether or not Gorgal and Cowen tainted that evidence, before  
2     production, that they are using in this case. That is what I  
3     am trying to do is establish this relationship.

4             Also this chart I think demonstrates that G-C Partners  
5     was in the center of all of the entities that are involved in  
6     the criminal case, and they also have these federal  
7     allegations of corruption of evidence. That is why that  
8     Randall entry is on there.

9             THE COURT: All right. Go ahead and pursue your  
10     questioning.

11             MR. ETHINGTON: Well, we would offer Exhibit No. 16  
12     so that we can talk about it in the record.

13             THE COURT: The objection that you have previously  
14     made?

15             MR. GREEN: Same objection, Your Honor.

16             THE COURT: And those objections are overruled.

17     This is Defendant's Exhibit No. 16, which is admitted.

18     Q.     (BY MR. ETHINGTON) Looking at this exhibit now, does it  
19     accurately depict, from your knowledge, the relationship  
20     between G-C Partners, Exel, TTS, the Randall case that we  
21     won't belabor the Court with, and the U.S. Attorney's Office?

22     A.     I, frankly, am confused by the way you are asking it, but  
23     I don't know how to answer that with the exception of TTS did  
24     an audit, yes, in October/November of 2007. It was not  
25     related to the collection of the evidence which occurred in

1 April and May of 2007 which are on Mr. Rosen and the Alvarez  
2 and Marsal reports on the collection of that evidence.

3 The U.S. Attorney's Office did briefly hire G-C Partners  
4 in a few-month period, which I think the dates are accurate.  
5 I don't know the dates off the top of my head. And then when  
6 the allegations were brought, they terminated the contract.

7 Q. What was the reason for the U.S. Attorney's Office hiring  
8 G-C Partners?

9 A. Basically so that they would be -- could provide some  
10 expertise as to what they had done in this case.

11 Q. It shows here August of 2009 to January of 2010. Could  
12 you tell us whether that would be an accurate time frame?

13 A. It seems about right. I don't have the dates in front of  
14 me.

15 Q. Are you familiar with the U.S. Attorney's Office --

16 MR. ETHINGTON: I am just trying to pin this down a  
17 little bit quickly, Your Honor.

18 Q. (BY MR. ETHINGTON) -- the U.S. Attorney's Office seeking  
19 an employment contract for consultant form from the state DA's  
20 office that was used for the -- TO memorialize the  
21 relationship. Are you familiar with that?

22 A. I am not familiar with how the relationship went. I am  
23 familiar that there was a brief period where they were  
24 contracted. I am not familiar with the negotiations or  
25 anything like that going on.

1 Q. Was there a written contract, if you know?

2 A. I don't know. There might well have been. I just don't  
3 know. I know there was some kind of business arrangement. I  
4 don't know what it was.

5 Q. G-C Partners presented to you, I understand, some, what I  
6 will call, chain of custody documents. Is that right?

7 A. Yes, sir.

8 Q. Okay. And then those chain of custody documents were  
9 produced to the Defense in the normal course of discovery. Is  
10 that right?

11 A. Yes, sir. And supplemented as we got additional from  
12 them.

13 Q. Those chain of custody documents regarding -- from G-C  
14 Partners, were they given to you first and then you gave to  
15 the U.S. Attorney's Office, or do you know?

16 A. I am not sure if they came straight to me or if they came  
17 to the U.S. Attorney's Office on the first instance. On the  
18 second instance, they were emailed to me and I provided them  
19 to Ms. Groves. The first ones may have either physically gone  
20 to the U.S. Attorney's Office first or me first. I just don't  
21 remember.

22 MR. ETHINGTON: May I approach the witness, Your  
23 Honor?

24 THE COURT: Yes.

25 Q. (BY MR. ETHINGTON) Agent Lynd, I will show you the chain

1 of custody documents that appear to be presented to us via  
2 that transmittal letter from G-C Partners. Do you see those?

3 A. Actually I see more than just that here, sir.

4 Q. Yeah. There is quite a bit more than that. But could  
5 you remove from what you are looking at there the transmittal  
6 letter, I guess you would call it, and the G-C Partners chain  
7 of custody forms? Do you got it?

8 A. Yes, sir.

9 Q. And I think we all know, but for the record, chain of  
10 custody on electronically stored information is just as  
11 important as any other evidence in a criminal case, isn't it?  
12 The chain of custody?

13 A. Yes, sir.

14 Q. And so can you quickly count the number of pages that  
15 were produced regarding --

16 A. Well, in this supplemental one there appears to be one,  
17 two, three, four, five, six, seven, eight, nine. But this is  
18 the second of two sets of chains of custodies. There were  
19 other ones produced before this.

20 Q. Produced by the Government to the Defense?

21 A. Yes, sir.

22 Q. And how were they produced?

23 A. I don't know if you got them via email or you got them  
24 via letter. I don't know how it gets transmitted to the U.S.  
25 Attorney's Office to you, sir.

1 Q. So the Judge knows, the date of that letter is August 8th  
2 of 2012?

3 A. Yes, sir. This is about three or four days after we got  
4 them.

5 Q. And there were additional --

6 A. This is the additional, sir.

7 Q. Okay. And there were previous --

8 A. Yes, sir.

9 Q. -- chain of custody documents --

10 A. Yes, sir.

11 Q. -- on G-C Partners?

12 A. Yes, sir.

13 Q. How were those presented? How were those sent to us?

14 A. Again, sir, I am not at the U.S. Attorney's Office when  
15 they get turned over. I don't know.

16 Q. Did you receive a couple of days ago a response to the  
17 subpoena that I had presented?

18 A. Ms. Groves did, yes, sir.

19 Q. Okay. A copy of a subpoena that I issued to G-C Partners  
20 for production of chain of custody documents?

21 A. Yes, sir.

22 Q. And did that production include substantially more  
23 documents than what you are holding there?

24 A. Actually, sir, it produced almost all the same documents  
25 we had given to you previously, either our two chains of



1 custody we have actually given to you that they didn't produce  
2 in that production for you, and they produced for you some  
3 invoices they never produced for us.

4 Q. I guess it is your testimony, then, that G-C Partners  
5 produced chain of custody documents in two batches to the U.S.  
6 Attorney's Office?

7 A. Yes, sir.

8 Q. Why was there two batches? Do you know?

9 A. I do know, sir.

10 Q. I am sorry?

11 A. I do know, yes, sir.

12 Q. Then why?

13 A. Because I noticed some were missing and called them up  
14 and said, "It doesn't appear you have all the chains of  
15 custody here. We need the rest of them."

16 Q. And they followed up on that?

17 A. Yes, sir.

18 Q. And then they produced -- They didn't produce two  
19 additional ones?

20 A. There are two chains of custody forms that we produced  
21 for you that we got from them. They should be labeled -- I  
22 can't remember the start of them, but the last three digits  
23 are ECD Echo, Charlie, Delta. So they probably start the same  
24 SB-1 dash something, ECD 1 and ECD 2. Those are not, or at  
25 least I do not see them in that document, but they had

1 previously been provided to you when we turned over the first  
2 batch of discovery documents, or first batch of chain of  
3 custody in discovery.

4 Q. Have you had a chance to review those chain of custody  
5 documents that were produced to me a few days ago in answer to  
6 the subpoena I issued?

7 A. I actually reviewed these when we got them from them,  
8 yes, sir. I didn't review them when -- I reviewed them when  
9 we got them from Mr. Gorgal. When we got these I reviewed  
10 them; not the set that you got from Mr. Cowen or Mr. Gorgal.  
11 I am not sure --

12 Q. Can you characterize for the Judge, so we can move along  
13 quickly, that the production of documents that were given to  
14 me in answer to the subpoena are readable and legible, and the  
15 ones that they gave to you have blanks in it and missing  
16 information and illegible?

17 A. I would characterize their handwriting as poor, sir, but  
18 I won't say it is illegible, but I don't know what you mean by  
19 blanks.

20 MR. ETHINGTON: May I approach?

21 THE COURT: Yes.

22 Q. (BY MR. ETHINGTON) Chain of custody has to do with  
23 receiving information, possessing it, and then passing it on  
24 to someone else. Right?

25 A. Yes, sir.

1 Q. Do you see this blank here -- This form?

2 A. Yes, sir.

3 Q. It says "received from" and it is blank.

4 A. That is correct, sir.

5 Q. And it says on the next one "received from" and it is  
6 blank.

7 A. Yes, sir.

8 Q. And it says "manufacture, model, and serial number" and  
9 those are blank.

10 A. Yes, sir.

11 Q. Can you tell me what that action, that little scribbling  
12 there underneath that, is?

13 A. It looks like initials of a person, but I can't tell for  
14 sure.

15 Q. Isn't it important in chain of custody documents to be  
16 legible to where somebody reading them can understand where  
17 the evidence started from and where it went through and then  
18 where it ends up? Isn't that important?

19 A. For us it is, sir. I am not going to vouch for their  
20 quality of their work, sir, on the chain of custody documents  
21 themselves.

22 THE COURT: Mr. Ethington, how much longer do you  
23 expect your examination of Agent Lynd?

24 MR. ETHINGTON: Another half hour, Judge.

25 THE COURT: I am going to keep you to it. No more

1       than a half hour.

2               MR. ETHINGTON: May I make this an exhibit, Your  
3 Honor? Do you have a copy of this?

4               MS. GROVES: Which one?

5               MR. ETHINGTON: I am not sure. It is the illegible  
6 ones, I will call it.

7               MS. GROVES: Is it this one?

8               MR. ETHINGTON: Yes.

9               MR. ETHINGTON: The ones that we sent out to you on  
10 August the 8th, or what you subpoenaed?

11              MR. ETHINGTON: August 8th.

12              We would mark that as Exhibit No. 17, Your Honor.

13              MR. GREEN: No objection.

14              THE COURT: Admitted.

15              MR. ETHINGTON: May I use the elmo on this?

16 Q.       (BY MR. ETHINGTON) You see that form? That is what we  
17 have been talking about, isn't it?

18 A.       Yes, sir.

19 Q.       Would you say, in the FBI's estimation, that that is an  
20 inadequate accounting of the chain of custody for whatever  
21 item that is that they are talking about or writing about?

22              MR. GREEN: Objection, Your Honor. I don't know the  
23 FBI standards or what applies to the industry. I object to  
24 the question.

25              MR. ETHINGTON: I will rephrase it.

1 Q. (BY MR. ETHINGTON) Does that give you enough information  
2 to be able to account for the chain of custody on these  
3 exhibits or this evidence?

4 A. It would depend on the context, sir. If this is 1, for  
5 example, of 20 and they all came from the same person and  
6 there was a cover sheet from that person on the received, it  
7 might. In and of itself, it does not.

8 Q. Going to the next one, would you say that in and of  
9 itself is inadequate in the chain of custody accounting?

10 A. Again, without any other documents surrounding it, I  
11 could not tell where they got it from. That would be correct,  
12 sir.

13 Q. And is that fairly the representation of the rest of this  
14 stack? They are just blanks and somewhat illegible?

15 A. It is representative. They all look about the same, sir.

16 Q. Do you have a piece -- This is now Exhibit No. 17, so I  
17 want to be sure and keep it in order. Do you have any in  
18 front of you, there, any part of it?

19 A. Alvarez and Marsal only, sir; not G-C Partners.

20 Q. Can you tell the Judge whether there was any controversy  
21 surrounding the chain of custody of these electronically  
22 stored information items as you accumulated them in  
23 conjunction with the criminal case?

24 A. Just that all the forms weren't there when they initially  
25 provided them to me, sir.

1 Q. In the accumulation of the hard drives at Exel, was there  
2 one of the computers, for instance, that had had the hard  
3 drive removed?

4 A. You are talking about two different things at this point,  
5 sir. That was not looked at by G-C Partners, nor was it  
6 provided to me. But there was -- As I understand it, there  
7 was a question about one of the computers, and I can't  
8 remember whether it was Mr. Brown's or Mr. Kelly's, off the  
9 top of my head, but there was a question about one of the  
10 laptops where they went to go look at it, and it had been  
11 stored in Mr. Merrill's office, I believe, and when they went  
12 to go look at it there was no hard drive in it.

13 Q. Was that an indication to you, as you were gathering  
14 evidence, that there had been spoliation or even removal or  
15 destruction of evidence?

16 A. By Mr. Brown or Mr. Kelly possibly; by Exel, no.

17 Q. I am not accusing Exel of anything. I am just saying  
18 that in your accumulation of evidence on the Exel aspect of  
19 this case, as it relates to the Musacchio case now, there was  
20 examples of people either hiding evidence or destroying  
21 evidence. Isn't that true?

22 A. On the TTS computers, yes; on the Exel computers, no.

23 Q. Was the missing hard drive, I will call it on I think it  
24 was a laptop, was that the laptop that Kelly or Brown used at  
25 Exel, or Kelly or Brown used --

1 A. At Exel. But again, sir, you asked if that was evidence  
2 of spoliation, and my answer would be no. In interviewing  
3 Mr. Richardson about it, he said that drives were often  
4 repurchased -- Repurposed. Sorry. I didn't mean repurchased.  
5 Repurposed. And he didn't consider that to have been  
6 necessarily a particularly malicious act; that that drive may  
7 have been done just because they needed that drive in another  
8 computer. We have also since talked to Mr. Kelly, and he has  
9 confirmed that he thinks that it was just repurposed.

10 Q. So Mr. Kelly is a Defendant in this case.

11 A. He has pled guilty, yes, sir.

12 Q. He is a Defendant in this case. Correct?

13 A. Yes, sir.

14 Q. And that was his laptop we are talking about. Correct?

15 A. Again, I don't remember if it was Brown or Kelly's. It  
16 was one of the two of them, yes, sir.

17 Q. You said Kelly told you that it was repurposed.

18 A. Yes, sir. But I don't remember if he said it was his or  
19 Brown's. He just said they repurposed the drives all the  
20 time.

21 Q. So it was important in your criminal investigation to get  
22 information from a computer that was used by one of the  
23 Defendants, wasn't it?

24 A. Sir, I am not sure what you are asking, because in this  
25 particular case when we came to this case none of the original

1 evidence, as far as we knew until a few months ago when we  
2 found these back-up tapes, none of the original evidence still  
3 existed at that point. It had all been used for too long to  
4 ever be of use for us going forward. We had to rely on, and  
5 did rely on, the images and the collection made by the other  
6 companies at the times concurrent with the incidents  
7 occurring. So we didn't go back to any of the places and look  
8 for additional computers unless those computers had not been  
9 used or touched, or cell phones or whatever, since the time of  
10 the incidents.

11 Q. That is what I am getting at. From the time of the  
12 alleged incidents in the indictment until the time the FBI was  
13 starting to acquire evidence was a couple of years, wasn't it,  
14 or more?

15 A. I think it was two, sir. Again, I would have to go back  
16 and look at the timeline. I think it was two years. I would  
17 have to go back and look at the timeline, though.

18 Q. And during that two-year period, this evidence that the  
19 FBI is interested in, it had been used by other people, I  
20 guess repurposed or --

21 A. No, sir, it had not. You are confusing the issues. The  
22 evidence that we are looking at, that we looked at, were the  
23 collections made at the time of the incidents. So collections  
24 were made in 2006. Those collections were left pristine. The  
25 computers that were being used that those collections were



1 made from may have been continued to be in use, but those  
2 collections were not used after that. Even for the purposes  
3 of the civil case, they didn't use the collections themselves.  
4 They used copies of those collections in order to continue  
5 doing their analysis.

6 Q. And the collections I guess made by Alvarez and Marsal,  
7 or G-C Partners if it is Exel or TTS, those collections  
8 occurred a year or so after the events --

9 A. No, sir. Those collections occurred starting in February  
10 2006 through April 2006 for G-C Partners. Those collections  
11 occurred for Andy Rosen from the court-ordered TRO in April  
12 2006. The collections occurred for Alvarez and Marsal in May  
13 of 2006. So the collection period would have included from  
14 approximately mid February--it may have been early February or  
15 late February--from approximately mid February through April  
16 4th or 5th, somewhere in there, 2006, as far as -- Sorry.  
17 May, not April. May 2006 for Alvarez and Marsal.

18 Q. You mentioned Andy Rosen. Andy Rosen mirror imaged, I  
19 guess, the TTS computers on behalf of Exel. Is that correct?

20 A. On behalf of the Court, sir.

21 Q. On behalf of the Court. Well, the Court asked for  
22 suggestions as to who the Court ordered expert would be,  
23 didn't they?

24 A. They did, sir.

25 Q. And they asked that from the Plaintiff?

1 A. Actually I think they asked it from Matt Yarbrough, who  
2 was the lawyer for the Plaintiff.

3 Q. Uh-huh. And he recommended Rosen.

4 A. I believe so, yes, sir.

5 Q. And the Court adopted that recommendation.

6 A. Yes, sir.

7 Q. Do you know that that recommendation came from G-C  
8 Partners?

9 A. I do not. I know it came from the attorney. It wouldn't  
10 surprise me to learn it had come from them.

11 Q. You know that there is a relationship, a working  
12 relationship and a professional relationship, between G-C  
13 Partners and ARS, Andy Rosen?

14 A. ASR, sir.

15 Q. ASR.

16 A. I know there is a relationship, yes, sir.

17 Q. A referral relationship. You have seen evidence of that.

18 A. That, and I know they also co-authored a book at some  
19 point.

20 Q. Right. So G-C Partners -- Would it be your testimony,  
21 just in your own observations, that G-C Partners had  
22 recommended Andy Rosen to do this preservation of evidence for  
23 the Court?

24 A. It wouldn't surprise me were they the ones who suggested  
25 it to Yarbrough, but all I know is that Yarbrough is the one

1 who suggested it.

2 Q. Okay.

3 MR. ETHINGTON: Judge, I know the Court had  
4 conducted a hearing yesterday of some consequence, and I don't  
5 know how long it was, regarding this Randall matter. I am  
6 going to assume the Court knows something about that because  
7 of the hearing yesterday. May I go into briefly, though, the  
8 allegations in the Randall matter having to do with G-C  
9 Partners?

10 THE COURT: Yes.

11 Q. (BY MR. ETHINGTON) You are familiar with the allegations  
12 made by the Receiver against G-C Partners in the Randall  
13 matter, are you not?

14 A. I am familiar with the allegations against Dave Cowen and  
15 Kal Loper of G-C Partners, yes.

16 Q. And those allegations are spoliation of evidence,  
17 destruction of evidence, or modification of evidence. Is that  
18 right?

19 A. The allegation is that modification of evidence occurred  
20 intentionally.

21 Q. Yes. And that is under investigation presently by I  
22 guess the FBI and the U.S. Attorney's Office in the Eastern  
23 District.

24 A. That is correct, sir.

25 Q. And do you have an idea, for the Court's benefit, as to

1 what the status of that case is and where it is going or how  
2 long it will be?

3 A. I do not, sir.

4 Q. And did you at one time, though, participate in that  
5 investigation?

6 A. I was the one who opened the investigation up based on  
7 the Receiver's allegations.

8 Q. And how long did you work on that case before you, I  
9 guess, were recused?

10 A. We self-recused, sir, and it was --

11 Q. I am not saying it in a bad way.

12 A. It was -- I think we opened it in February/March time  
13 frame of 2010, and I think we self-recused in 2011, but I am  
14 not positive. It might have been early 2012.

15 Q. And there was some -- I saw in your reports some  
16 reasonable suspicion on your part that the offense had  
17 occurred. Is that right?

18 A. There was enough to open an investigation, sir.

19 Q. There was communication that was part of the discovery  
20 between you and the Prosecutor, Ms. Groves, about whether it  
21 should be probable cause, reasonable suspicion. Do you  
22 remember that email?

23 A. I don't. I remember there was enough to open an  
24 investigation, though.

25 MR. ETHINGTON: May I have just a moment, Your

1 Honor?

2 THE COURT: Yes.

3 Q. (BY MR. ETHINGTON) What is the standard to open an  
4 investigation; actually formally start putting time in on it?

5 A. It varies, but in this case it would have been enough to  
6 have a reasonable belief.

7 Q. Reasonable belief. That is the phrase. But then, for  
8 this record purposes, you don't have any further knowledge as  
9 to what the status of it is or where it is going?

10 A. Not as of turning it over to the Eastern District, no,  
11 sir.

12 Q. Would it be important, though, to your work in the  
13 Musacchio case to know whether or not G-C Partners, who  
14 appears to be in the center of this, is guilty of a crime or  
15 convicted of a crime having to do with electronically stored  
16 evidence and the manipulation of it?

17 A. In theory it could be. I won't say it would or not, but  
18 it could be. In this particular case, I would say the answer  
19 is no, because we have enough corroborating evidence from  
20 elsewhere that shows that the chances of some kind of  
21 tampering or spoliation in this particular instance are so  
22 vanishingly small as to be almost impossible. But in general,  
23 theoretically, it could impact that.

24 Q. You have told us, and I won't rehash this, but you have  
25 told us that G-C Partners, when you asked them for chain of

1 custody documents, which are critical, they were inadequate  
2 and you had to ask them twice, and then there is a batch of  
3 them that on their face --

4 A. Yes, sir. But that has nothing to do with whether the  
5 evidence is reliable or not. The evidence being reliable on a  
6 reliable image -- a log is generated as you do the copying, as  
7 you do the imaging. So, for example, if you used FTK to  
8 image, which is the tool we generally use in the Bureau, as it  
9 does the image, it generates a log that says it is making the  
10 copy properly. As it generates that log, it also gives you  
11 check sums and other things so that you know you have a good  
12 copy.

13 With the images that we received from G-C Partners, we  
14 did receive the logs that showed the copies being made. Those  
15 logs appear to be in tact, appear to be adequate, appear to  
16 show that those are indeed good copies.

17 So while the documentation behind the collection may not  
18 be up to the FBI standards, the documentation of the copying,  
19 the logs generated automatically by the system as it makes the  
20 copy, are forensically sound and indicate to me that those are  
21 good copies and forensically sound copies of the computers  
22 made at the time they were made.

23 Q. So your testimony is you are not going to rely on the  
24 chain of custody documents, or even the results or work of G-C  
25 Partners. You are just going to rely on these electronic logs

1       that reside inside these servers. Is that your testimony?

2       A. In terms of determining whether the evidence is reliable,  
3       yes; in terms of overall for the case, no.

4       Q. So it is your testimony, in determining whether the  
5       evidence is reliable you are not going to rely on G-C  
6       Partners, their documents, or their work product to determine  
7       whether the evidence in this case is reliable?

8       A. Okay. Again, sir, I think -- And maybe I am splitting a  
9       fine hair and I don't understand what you are saying. To the  
10      extent that the image is a good image and is a reliable image,  
11      no, because the documentation doesn't pertain to that. The  
12      log generated by the computer process as it goes pertains to  
13      that. Knowing it is a forensically sound tool pertains to  
14      that.

15           As far as did they follow proper procedures to collect  
16      it, or something like that, that would not matter as far as  
17      whether the tool did its job properly. So, I mean, to me they  
18      are two different topics, sir.

19      Q. The tool would have been used by somebody at G-C  
20      Partners.

21      A. According to Mr. Gorgal and the documentation he  
22      provided, it was Mr. Gorgal in all but four instances.

23      Q. And then the tool in the Musacchio case was a SMART disk,  
24      was it not?

25      A. Not in every instance, sir. I think I said before there

1 is Paraben, SMART, and EnCase were used. There is A  
2 collection of tools depending on the kind of computer it was.

3 Q. I think it is your testimony, and correct me if I am  
4 wrong, that you really don't need to worry about the work  
5 product of G-C Partners, but if the tool was good and it did  
6 its job in collecting the evidence off of a server, and there  
7 is no indication of any monkey business on the evidence on the  
8 server, then that would be adequate?

9 A. Again, sir, you are talking two different things.

10 Q. Okay.

11 A. What the tool is telling me is it made a reliable copy of  
12 the image on the day the image was made. Now, if somebody  
13 were to suggest that there were tampering, that would say that  
14 the tampering would have had to occur prior to the image being  
15 created. The tool can't look back in time. It is not an  
16 analysis tool. It is a copying tool. So the generation of  
17 that log is just showing me that that copy, that image, that  
18 process that made that copy, was properly done and properly  
19 processed at that date and time.

20 Q. Can you tell the Court whether or not there was tampering  
21 by G-C Partners -- Have you got any evidence, one way or  
22 another, to show there was tampering by G-C Partners in the  
23 collection of their evidence in the Exel case?

24 A. I do not have any indications that would show tampering  
25 by G-C Partners in the Exel case.



1 Q. And do you have any evidence to show that there wasn't  
2 any tampering?

3 A. Yes, sir.

4 Q. And that is the logs?

5 A. No, sir. That is the confirmation from outside sources,  
6 not on the G-C Partners images, not on the Exel images, that  
7 would indicate the reliability of that data. So, for example,  
8 the data in the Exel case or the Excel computers, would show a  
9 computer intrusion from an I.P. address on a certain date  
10 using an administrative level account. I can then go to, for  
11 example, whoever the service provider is for that log, say  
12 Comcast or Verizon or AT&T, and subpoena them and ask them who  
13 owned this I.P. address on this date and time. They can then  
14 provide me that information.

15 If that matches up -- So, for example, if it is  
16 Mr. Brown's home I.P. address from his home account, and then  
17 there is an email from Mr. Brown to some other person a minute  
18 after that saying, "Look what I just found in the computer," I  
19 now have that email that confirms it, I have the logs that  
20 show an intrusion occurred, I have the data from Bell South or  
21 AT&T that shows all of those things all pointing to the same  
22 point in time, which would confirm the reliability of the data  
23 on those computers.

24 Q. Mr. Brown and Mr. Kelly, they were what is called  
25 superusers of the computers or administrators, weren't they?

1 A. Administrators.

2 Q. Administrators? And that means you have got unfettered  
3 access to the computer system?

4 A. In general, yes. There might be some systems that you  
5 don't have access to, but in general the answer to that is  
6 yes.

7 Q. And the logs that you have described that you considered  
8 to be reliable, they are subject to manipulation, aren't they?

9 A. In theory, yes, sir. But the number of log entries in  
10 this particular case is so voluminous and so consistent with  
11 the other data, that for it to have been done would be, again,  
12 practically impossible.

13 Q. These I.P. addresses, are those transferable or are they  
14 permanent?

15 A. It is going to depend on the source. So, for example, if  
16 you have a dial-up modem in your house, it may change each  
17 time you go. If you have a Comcast cable modem to your house,  
18 it may stay the same. Basically you have to go back to the  
19 service provider and ask for the dates and times in order to  
20 get those.

21 MR. ETHINGTON: May I have just a moment, Your  
22 Honor?

23 THE COURT: Yes.

24 Q. (BY MR. ETHINGTON) Can you briefly describe for us what  
25 the logs look like in the Randall matter?

1 A. Which logs? I mean, there is multiple different things.  
2 The Randall matter didn't have to do with the Outlook Web  
3 Access or IIS. It was a complete different instance. It  
4 wasn't talking about email. So I am not sure which logs you  
5 are referring to.

6 Q. I don't know which logs there are existing in the Randall  
7 matter. That is all sealed up from me. During the time that  
8 you participated in the investigation of the Randall matter  
9 did you look at the logs?

10 A. No, sir. I looked at production of portions of the logs  
11 done by the Receiver's forensic expert. I did not look at the  
12 raw logs.

13 Q. So could you testify today that there was indications of  
14 document manipulation or destruction in the Randall matter,  
15 from your own observations?

16 A. I cannot, sir. I can testify -- What I can testify in  
17 that matter is from the information provided to me--not from  
18 any of my own observations; only from the information provided  
19 to me--that there does appear to have been alterations to the  
20 computers. Whether those alterations were intentional or not  
21 intentional, I cannot testify to one way or another at all.

22 Q. From your investigation in the Exel matter and the TTS  
23 matter, there were alterations in those matters, too, before  
24 the FBI showed up, wasn't there?

25 A. Sir, again, that is not accurate. The FBI didn't show up

1 for any of these computers. Andy Rosen showed up to image the  
2 computers at TTS. The FBI did not show up to image those  
3 computers. From answering, though, for your question is,  
4 there is strong indication that prior to April 4th that there  
5 was emails and other files deleted from the computers prior to  
6 Mr. Rosen showing up.

7 THE COURT: April 4th of what year?

8 THE WITNESS: Sorry. 2006, sir.

9 THE COURT: 2006.

10 THE WITNESS: I am sorry. Yes, 2006.

11 Q. (BY MR. ETHINGTON) And strong indication that there were  
12 deletions or modifications in the machines for Exel and TTS --

13 A. No, sir. Just for TTS.

14 Q. Just for TTS.

15 A. Yes, sir. And when I say TTS, that also includes the  
16 home machines of some of the individuals who worked for TTS  
17 who brought their home computers in.

18 Q. And to clear up my confusion on some of this, when we are  
19 talking about the different computers for these different  
20 entities, I guess we are talking about a server, which is a  
21 big piece of equipment that would reside in an office maybe,  
22 and then desktops, and then maybe laptops, and then maybe home  
23 computers also.

24 A. And I believe there were also some cell phones,  
25 BlackBerrys, things like that, too.

1 Q. That would operate through the server?

2 A. In the case of total, they initially, until about  
3 January, operated not through the server because the mail was  
4 remote through Sprint, I believe, and then after January of  
5 2006 through the time it occurred, the BlackBerry exchange was  
6 indeed at there, but there was some of them -- There was a  
7 time period when the mail was hosted not at those computers.

8 Q. How did the FBI --

9 MR. ETHINGTON: I am winding down, Your Honor.

10 Q. (BY MR. ETHINGTON) How did the FBI in the Exel/TTS  
11 accumulation of evidence, how did they acquire it? How did  
12 you acquire it?

13 A. We did subpoenas for the already existing images to the  
14 individuals who were in possession of them, and then we did  
15 search warrants to look through the contents of those once  
16 they were in our possession.

17 Q. Okay. So a subpoena. And that is to law firms or the  
18 companies or both?

19 A. I would actually have to go back and look, but I think it  
20 was to the law firms representing the companies. I am not 100  
21 percent positive.

22 Q. I am not trying to pin you down on this. Let's focus on  
23 Exel to start with. You accumulated electronically stored  
24 data from the Exel aspect of this case, didn't you?

25 A. We subpoenaed I believe it was Mr. Anderson who was

1 representing Exel at the time. He had then talked to whoever  
2 may have had the records. So, for example, Fish & Richardson  
3 still retained some of the records. They provided us some of  
4 those records, like the depositions, things like that. And  
5 then he told G-C Partners, directed them to bring us the  
6 images they had. And then, again, G-C Partners showed up at  
7 our lab and brought them. I can't remember if I went to Fish  
8 & Richardson to pick it up or if they showed up at our office.  
9 I don't remember which way it was for that.

10 Q. How long had this electronically stored information been  
11 stored in boxes --

12 A. From whenever they collected it until we were provided  
13 it.

14 Q. That was about four years?

15 A. It would have been 2006 to 2008. Maybe --

16 Q. Okay. About two years?

17 A. Two to three; somewhere in there, yes, sir.

18 Q. There was some finding of evidence that appeared to be  
19 lost or misplaced or shelved somewhere?

20 A. That was Alvarez and Marsal. That wasn't G-C Partners.

21 Q. Okay. Was that regarding, then, TTS?

22 A. Yes, sir.

23 Q. So there was some of this evidence that we will be  
24 talking about here in the Court that just sat on a shelf  
25 somewhere for four years, didn't it, or more?

1 A. It would have been 2006 through this year, so that would  
2 have been almost six years.

3 Q. Okay. Now, without going through each of these items,  
4 like a hard drive with a serial number on it or a server with  
5 a serial number on it, because it all comes to you, I guess,  
6 from different directions. But I would like to ask you, you  
7 were aware that this electronically stored data evidence that  
8 you were trying to subpoena and request, that had been through  
9 many hands before it gets to you.

10 A. I wouldn't say many, sir. We got it -- In the case of,  
11 for example, Alvarez and Marsal, the same individual who  
12 collected it from Tom Riehl at TTS was a guy named John  
13 deCraen. He had it still in his evidence storage facility at  
14 Alvarez at Marsal, and that is where we got it turned over  
15 from.

16 In the case of Andy Rosen, he had it in his storage  
17 facility down in San Antonio and he turned it over to us.

18 In the case of G-C Partners, they had it in their storage  
19 facility, which had moved. They had actually moved offices  
20 during that time. And then they turned it over to us.

21 Q. And this Alvarez and Marsal, for instance, that is a very  
22 reputable outfit, as far as you know, isn't it?

23 A. I actually don't know anything about them.

24 Q. Actually a national or international company. Do you  
25 know that much?

1 A. I do, but I don't know anything about their reputation  
2 within the industry.

3 Q. Okay. They did their imaging after --

4 A. They did not do any imaging, sir.

5 Q. Oh, they did not do any imaging.

6 A. No, sir. They had mail extracts, which were done by Tom  
7 Riehl who is an employee at TTS, and provided to them, and  
8 they had the original back-up tapes. So the back-up tapes  
9 that were sitting there were not imaged. Those are the actual  
10 tapes from the date it happened. They were never imaged.  
11 They were taken out of the -- There is like, for lack of a  
12 better term, a bank, this computer bank of tapes. They were  
13 taken out of that bank, put into storage back in 2006, and  
14 hadn't been touched since.

15 Q. Well --

16 A. As far as I know.

17 Q. As far as you know. There was another company that we  
18 are all familiar with, I think, Deloitte & Touche. Deloitte &  
19 Touche is referenced in working with TTS in the accumulation  
20 of this electronic data.

21 A. I am not familiar with what they did, sir.

22 Q. You didn't -- That wasn't part of your investigation?  
23 Are you familiar with the Thompson & Knight report?

24 A. Yes, I am, sir.

25 Q. And it references Deloitte & Touche doing some of this



1 computer analysis?

2 A. That is the analysis, not the collection. I am sorry.  
3 When you are talking about collection, I am -- There is two  
4 separate things here, sir. Again, when you make these copies,  
5 that is one thing. That is not even looking through the  
6 copies. That is literally, like, going to a desk and  
7 photocopying a document, for lack of a better term. The  
8 person who reviews that document is not necessarily the same  
9 person who photocopies it. And, again, the people who are  
10 doing the analysis are not working off that original document.  
11 They are working off of photocopies.

12 Q. So Deloitte & Touche did analysis of the TTS --

13 A. They did something for Thompson & Knight. Thompson &  
14 Knight were kind of vague about it with us.

15 Q. They were kind of vague?

16 A. Yes, sir.

17 MR. ETHINGTON: May I approach, Your Honor?

18 THE COURT: Yes. And you need to wind it up. Five  
19 minutes. You have gone over the 30 minutes.

20 MR. ETHINGTON: Yes, Your Honor.

21 Q. (BY MR. ETHINGTON) Do you have a copy of the Deloitte &  
22 Touche investigation analysis of this evidence that we are  
23 going to have in court here?

24 A. I have a copy of the Thompson & Knight report, sir, yes,  
25 sir.

1 Q. You have a copy of it?

2 A. Yes.

3 MR. ETHINGTON: May I approach real quick?

4 THE COURT: Yes.

5 Q. (BY MR. ETHINGTON) You have a copy of Exhibit No. 11,  
6 Hearing Exhibit No. 11, don't you?

7 A. Yes, sir.

8 Q. And in there somewhere, and I don't think I marked that  
9 copy, there is a reference to Deloitte & Touche doing some  
10 work on this electronic evidence. Right?

11 A. Again, I have to go through and look for it again, sir,  
12 but there is references to a lot of people looking through the  
13 evidence with them, including Alvarez -- Well, I don't think  
14 they actually mentioned Alvarez and Marsal by name here. They  
15 mentioned a whole bunch of lawyers and other people going  
16 through it, too.

17 Q. Okay. So a whole bunch of people and lawyers have gone  
18 through the evidence before it ever gets to you.

19 A. Again, sir, they didn't go through the evidence that got  
20 to me. They went through copies of the evidence, not the  
21 original evidence.

22 Q. That is what I am getting at. I am going to wind it up  
23 here. You don't know what happened to this evidence before it  
24 was imaged, and then later on four years later given to you.  
25 You don't know what happened with these law firms and these

1 consultants reviewing the evidence before it was determined to  
2 mirror image it, do you?

3 A. Sir, what I know is what the various forensic people  
4 reported to me, which is that they made copies at the time and  
5 places specified. When they made the copies, they then  
6 provided copies -- They made images. They provided copies of  
7 those images to the law firms so that those law firms could  
8 review the evidence. So you are right, I wasn't physically  
9 there, but I know what they have reported to me.

10 Q. Yes. And there was a review of this electronic evidence  
11 by law firms and company employees, both Exel and TTS, to  
12 determine whether or not they even ought to spend the money on  
13 Deloitte & Touche and Alvarez and Marsal and G-C Partners.  
14 Isn't that right?

15 A. I don't think the law firm decided whether or not to  
16 spend the money on G-C Partners. They had already decided to  
17 spend the money to look for that because the president of Exel  
18 was insistent upon spending the money.

19 MR. ETHINGTON: That is all we have, Your Honor.

20 Thank you, Agent.

21 THE COURT: Mr. Green?

22 MR. GREEN: Thank you, Your Honor. May I approach  
23 the witness?

24 THE COURT: Yes.

25

1 CROSS EXAMINATION

2 By Mr. Green:

3 Q. Agent Lynd, if we could back up just for a minute so that  
4 we have a clearer picture of what happened before the FBI got  
5 involved, are you familiar with the events that occurred that  
6 led to data collection by forensic firms before the FBI was  
7 even involved in this?

8 A. I am, sir.

9 Q. And could you look at the exhibit book at Exhibit  
10 No. 219?

11 THE COURT: Is this Government Exhibit No. 219?

12 MR. GREEN: Government Exhibit No. 219, yes, Your  
13 Honor.

14 THE WITNESS: Yes, sir.

15 Q. (BY MR. GREEN) Do you recognize Government Exhibit  
16 No. 219?

17 A. I do, sir.

18 Q. Did you participate in the production and making this  
19 exhibit?

20 A. Yes, sir.

21 Q. And does this reflect your understanding of the relevant  
22 events that occurred that led to data collection by third  
23 party forensic firms?

24 A. As far as the computer evidence, yes, sir.

25 Q. Yes. Computer digital evidence we are talking about.

1 A. Yes, sir.

2 Q. Thank you.

3 MR. GREEN: I would move Government Exhibit No. 219  
4 into evidence, Your Honor.

5 MR. ETHINGTON: No objection.

6 THE COURT: Admitted.

7 Q. (BY MR. GREEN) Agent Lynd, is this an enlargement of  
8 that same exhibit?

9 A. It is, sir.

10 Q. So if you could go through -- If you could just describe  
11 what is on this exhibit and tell us how this timeline  
12 describes what happened as far as the digital data collection.

13 A. G-C Partners was hired by Exel in February 2006 to try  
14 and determine whether or not their computers had been intruded  
15 upon. G-C Partners, in order to do that, began to image  
16 computers at Exel. They started with the Dallas office,  
17 because they happened to be local and that is where the CEO  
18 was at. They imaged the computers at the local office, which  
19 I think it is Addison, but the Dallas office. They hadn't  
20 found anything there yet, so they moved onto the servers which  
21 were located in Memphis, Tennessee and began copying those.  
22 The process of copying those and then analyzing those  
23 basically went from February through March of 2006. The  
24 images were made by Ralph Gorgal and the analysis was done by  
25 David Cowen.

1 Q. If I can stop you right there, because I want to ask you  
2 a couple of questions about that early time frame.

3 Now, in February of 2006, isn't it true that Exel at the  
4 time was concerned, at first, that their phones were tapped?

5 A. That is true, sir.

6 Q. And they believed -- And this was after Mr. Musacchio,  
7 Mr. Brown, and Mr. Kelly had all left Exel and started this  
8 new firm called Total Transportation Systems. Is that  
9 correct?

10 A. That is correct, sir.

11 Q. And Total Transportation Systems, or TTS as we have been  
12 referring to it here, that was a competing firm to Exel. Is  
13 that correct?

14 A. Yes, sir.

15 Q. And during that time frame --

16 MR. GREEN: It is now up on the screen, Your Honor.

17 Q. (BY MR. GREEN) And during that time frame they hired  
18 somebody to sweep their phones to see if they were tapped. Is  
19 that correct?

20 A. They did something to check the phones. I don't know if  
21 it was a sweep or check for bugs, or what they did.

22 Q. And that firm that did that for Exel suggested -- they  
23 didn't find anything and suggested maybe they should look at  
24 their email system. Is that correct?

25 A. That is correct, sir.

1 Q. And that is when Exel hires G-C Partners to come in and  
2 look at their data systems and see if there is any breaches.  
3 Is that correct?

4 A. That is correct, sir.

5 Q. And this is long before -- well, at least months before  
6 any civil lawsuit was filed. Is that correct?

7 A. Yes, sir. Before the suit is filed, yes, sir.

8 Q. And this is before lawyers from the TTS side were even  
9 involved. Is that correct?

10 A. As far as allegations of intrusion, yes, sir. There were  
11 allegations of some misconduct going back and forth between  
12 the two companies prior to that that didn't relate to the  
13 intrusion.

14 Q. But this was the beginning of Exel trying to determine if  
15 they were being attacked from the outside. Is that correct?

16 A. Yes, sir.

17 Q. Now, then G-C Partners does an analysis, a network  
18 analysis of the data systems of Exel during that early time  
19 frame in February. Is that correct?

20 A. Yes, sir.

21 Q. And then at that point that is when there is a  
22 determination made by Dave Cowen, I believe, of G-C Partners  
23 that there were actual intrusions into the email system of  
24 Exel. Is that correct?

25 A. That is correct, sir.

1 Q. And was it at that point that Ralph Gorgal from G-C  
2 Partners starts doing imaging of computers from Exel?

3 A. No. He had already started imaging them in Dallas. That  
4 is when he moved out to Memphis and started imaging the ones  
5 in Memphis that they thought were intruded on. Before that he  
6 had been in Dallas doing images.

7 Q. And is that reflected in that first box on the right hand  
8 side that says February 14th 2006 to March 30, 2006?

9 A. Yes, sir.

10 Q. And that was Ralph Gorgal making a set of images or  
11 copies of computers at Exel both in Dallas and in Memphis?

12 A. Ralph Gorgal made most of them. Again, Mr. Loper did  
13 make four.

14 Q. Are we relying on any computers made by -- images made by  
15 Mr. Loper?

16 A. No.

17 Q. Then what is the next thing that happens on that  
18 timeline?

19 A. Early April, I can't remember what day the actual lawsuit  
20 is filed. It says there April 3rd the lawsuit is filed is the  
21 next thing, and the Court orders basically there is a  
22 preservation of the computers at both Exel and Total.

23 Q. And does that prompt another round of copying by  
24 Mr. Gorgal?

25 A. Yes, sir. But he only copies some of the computers this



1 time, not all of them this time.

2 Q. But included in the ones that Mr. Gorgal copies on that  
3 box, the second orange-colored box on the right-hand side,  
4 April 3rd to April 4th, that also includes some of the  
5 machines that were copied earlier.

6 A. Yes, sir.

7 Q. But it specifically included the IIS servers.

8 A. Yes, sir.

9 Q. And just so we all understand, what is an IIS server,  
10 just briefly?

11 A. When somebody uses your computers -- if you are a company  
12 and somebody is going to your company's computers to look at  
13 your web page, et cetera, and if you have an email accessible  
14 via the web, that is the computer that conducts the  
15 transaction that allows an outside person to use your website  
16 to do business with you.

17 Q. And that was copied twice by Ralph Gorgal. Is that  
18 correct?

19 A. That is correct, sir; once early in or mid March and once  
20 early in April.

21 Q. And you have copies of both of those sets of images. Is  
22 that correct?

23 A. Yes, sir.

24 Q. The TRO ordered both sides to do copying. Is that  
25 correct?

1 A. That is correct, sir.

2 Q. And did TTS also start doing copying at that time?

3 A. No. Andy Rosen copied TTS -- TTS wasn't copying on it  
4 their own. Andy Rosen copied it.

5 Q. Well, according to the Court order, TTS needed to get  
6 them copied; Andy Rosen's firm does the copying.

7 A. Yes, sir.

8 Q. Did Ralph Gorgal or anybody from G-C Partners participate  
9 in the copying of those machines at TTS that was done  
10 according to this, so on April 7th through April 9th --

11 A. No, sir. According to both Mr. Rosen and Mr. Riehl, who  
12 works for TTS, what occurred was Andy Rosen flew out, Tom  
13 Riehl went into a room with him and basically brought him one  
14 computer at a time, watched as -- The computers were turned  
15 off when they came in, watched Mr. Rosen take the hard drive  
16 out of each computer, make a copy, put the hard drive back in,  
17 then he would take that computer out, bring a new computer in,  
18 et cetera, until all the copies were made. Mr. Rosen did have  
19 an assistant with him. I can't remember his name.

20 Q. It wasn't Ralph Gorgal, was it?

21 A. No.

22 Q. After -- And you have copies of those images, too.  
23 Right?

24 A. No, I have the originals of those --

25 Q. The original images. Okay.

1 Later in this timeline, there is May 5th, 2006, Alvarez  
2 and Marsal. Can you explain that?

3 A. Yes, sir. At that point Thompson & Knight thought there  
4 might be some truth to Exel's allegations and started doing  
5 their own internal review to see if there was truth to the  
6 allegations from Exel. Thompson & Knight hired Alvarez and  
7 Marsal to come in and start collecting and conducting a review  
8 to see if that was the case. They brought Alvarez and Marsal  
9 in. Again, Mr. Riehl sat there while -- or actually hit the  
10 keys. Alvarez and Marsal didn't actually touch the keyboards.  
11 But at their direction he did something called a mail merger,  
12 which is basically take all the mail stores of all the  
13 individuals and, including from the back-ups, and produce them  
14 for Alvarez and Marsal. Then subsequent to that they actually  
15 provided all of the back-up tapes to Mr. deCraen.

16 Q. Now, we heard your testimony earlier about there was  
17 these other computers that were hanging around for years that  
18 were discovered much more recently; in fact, very recently?

19 A. Yes, sir.

20 Q. And are they from that time frame; the same time frame  
21 that is on this timeline?

22 A. They are, sir.

23 Q. And we also heard that there was back-up tapes that were  
24 also found that were from this time frame back then. Is that  
25 correct?

1 A. That is correct, sir.

2 Q. Now, so that is all within this timeline that is on  
3 Government's Exhibit No. 219.

4 A. I think technically that May 5th is actually the date  
5 they start the collection there. I think it actually takes a  
6 couple of days. It should show more than one day.

7 Q. So is it your testimony by the end of May of 2006 that  
8 all the Government's evidence relates -- all the digital  
9 evidence relates to this time frame to the end of May of 2006?

10 A. All of the digital evidence we are relying on for the  
11 offense charged. We do have some additional evidence that was  
12 collected later that relates to some potential enhancements at  
13 sentencing time, but that doesn't relate to the collection at  
14 this time.

15 Q. Okay. Now, you heard Mr. Ethington talk about  
16 Government's [sic] Exhibit No. 16 and some kind of audit that  
17 was done on behalf of TTS or on behalf of Exel at TTS sometime  
18 in late 2007?

19 A. I think October/November, yes, sir.

20 Q. And was that because, as part of the civil suit, TTS was  
21 ordered to get rid of anything that was obtained from the Exel  
22 system or from Exel that they weren't supposed to have?

23 A. That was what I was told by both representatives of Total  
24 and Exel.

25 Q. And to verify compliance with that, there was an audit

1     that was being conducted at TTS to make sure they complied  
2     with that. Is that correct?

3     A.    Correct. But that audit was on the live systems, not on  
4     the images that had been made for evidentiary purposes.

5     Q.    It didn't even involve any of the already collected  
6     evidence that the Government is relying on. Is that correct?

7     A.    That is correct, sir. It didn't touch that.

8     Q.    You were asked a lot of questions about chain of custody  
9     documents, and you said that they were important documents.  
10    Is that correct?

11    A.    Yes, sir.

12    Q.    You also testified that in this case that the evidence  
13    that was collected by Ralph Gorgal back in 2006, that you took  
14    time to try to independently corroborate that with other  
15    evidence that Ralph Gorgal or G-C Partners had no connection  
16    to to make sure that the evidence that Ralph Gorgal collected  
17    was reliable. Is that correct?

18    A.    That is correct, sir.

19    Q.    And you gave us an example of emails that contained -- I  
20    believe what you were telling us as in the indictment and  
21    several or many of the overt acts that there were emails  
22    between Mr. Musacchio and Mr. Brown that included excerpts  
23    from emails from the Exel email system.

24    A.    That is correct, sir.

25    Q.    And you looked at those emails and looked at when those

1 emails were being traded and then compared the emails that you  
2 have to the logs from the Exel web mail system. Is that  
3 correct?

4 A. In part, sir. I also compared them to the returns from  
5 Comcast, Verizon. I also compared them to the statements  
6 provided to me by Mr. Brown, Mr. Kelly, employees of Exel,  
7 employees of Total, such as Mr. Ebbinger, Mr. Vielhaber,  
8 Ms. Shipp, some of the board members of Total, including  
9 Mr. List, so I tried to confirm them from multiple Venues.

10 Q. Not only did you do the corroboration with other  
11 evidence; you looked at the sets of images that were collected  
12 by Ralph Gorgal himself. Right?

13 A. I did.

14 Q. Now, these are two sets of images obviously separated by  
15 time.

16 A. That is correct, sir.

17 Q. Did you -- And you testified previously that you looked  
18 at the images themselves to see if they were successfully  
19 imaged.

20 A. I looked at the logs for the images. There is a log that  
21 is generated. The image itself doesn't contain that data.

22 Q. Okay. So the log for those images, did they indicate  
23 that they were successfully obtained in images?

24 A. They did.

25 Q. And correct me if I am wrong, part of the process -- And

1     this is automated in these tools that are being used by  
2     whoever does imaging. Is that correct?

3     A.    That is correct, sir.

4     Q.    Including Mr. Gorgal using commercial tools to do this  
5     imaging.

6     A.    That is correct, sir.

7     Q.    And those logs indicate that the image was successful.

8     A.    That is correct, sir.

9     Q.    And it also reports back check sums, or what we commonly  
10    hear called cache values. Is that correct?

11    A.    Cache values, yes, sir.

12    Q.    And a hash [sic] value is in mathematical algorithm that  
13    will essentially, for lack of a better term, fingerprint a set  
14    of data so that you can compare a copy of it and see if it is  
15    the same set of data that it is supposed to be a copy of. Is  
16    that correct?

17    A.    That is correct, sir.

18    Q.    And after you collected the original images from Ralph  
19    Gorgal that he collected on those two occasions from the Exel  
20    system, did members of the RCFL, the regional computer  
21    forensic lab, compare those check sums, those algorithms to  
22    make sure that the images that they had were, in fact, copies  
23    of the system that they were supposed to be -- that they  
24    purported to to be?

25    A.    They did, sir.

1 Q. And did that match? Did those check sums match?

2 A. They did, sir.

3 Q. Now, with all these points, these independent points of  
4 corroboration, that Mr. Gorgal or G-C Partners had nothing to  
5 do with, that corroborates the logs and the other digital  
6 evidence collected by Mr. Gorgal, included in that you said  
7 there was things like interviews of employees, you know, there  
8 was the records from internet service providers, there is  
9 emails between Mr. Musacchio and Mr. Brown themselves that  
10 come from their personal accounts, and things like that. Is  
11 that correct?

12 A. Yes, sir.

13 Q. Included in that also, just so we are clear, if there  
14 were an allegation that Mr. Musacchio never went into the Exel  
15 system and took copies of email text and sent them to  
16 Mr. Brown, don't we also have an admission by Mr. Musacchio in  
17 the civil case that he did that on at least one occasion?

18 A. There is, sir.

19 Q. The tampering allegations you were asked about by the  
20 Receiver, that involves G-C Partners. Is that correct?

21 A. I was asked that by Mr. Ethington. He is not the  
22 Receiver.

23 Q. The allegations made by the Receiver that you were asked  
24 by Mr. Ethington about.

25 A. Yes, sir.



1 Q. And that involved -- Those allegations involved G-C  
2 Partners. Is that correct?

3 A. They involved two of the employees of G-C Partners, yes,  
4 sir.

5 Q. And you were involved in that investigation that was  
6 referred by the Receiver. Is that correct?

7 A. Yes, sir.

8 Q. Is there anything in that investigation that identifies  
9 Mr. Gorgal as being one of the people that is suspected of  
10 tampering with evidence in that other case?

11 A. No, sir.

12 Q. And that other case is separated in time by what? About  
13 three and a half years?

14 A. 2006 to 2009, so maybe just under three years.

15 Q. Somewhere around a three-year period from the collection  
16 of the data in this case to the collection or the imaging in  
17 that other allegation the Receiver has made. Is that correct?

18 A. Yes, sir.

19 Q. So it is separated by three years, and it doesn't involve  
20 Mr. Gorgal at all. Is that correct?

21 A. That is correct, sir.

22 Q. You were asked about the missing hard drive from the  
23 laptop at Exel. Did the fact that a hard drive was missing  
24 have anything to do with the data collection that Ralph Gorgal  
25 made from the Exel system?

1 A. No, sir. You can't collect data from something that  
2 doesn't exist.

3 Q. In fact, this was a laptop machine that was assigned  
4 to -- You can't recall whether it was Mr. Brown or Mr. Kelly.  
5 But by the time Ralph Gorgal is there in February of 2006,  
6 isn't it a fact that Mr. Brown and Mr. Kelly had long been  
7 gone from Exel?

8 A. I believe September and October 2005, respectively.

9 Q. So this is an old laptop that was assigned to one of them  
10 at some time the year previous.

11 A. Yes, sir.

12 Q. You were also asked about deletions from the TTS  
13 machines, from the Total Transportation Systems machines. Did  
14 those deletions -- What exactly were those deletions?

15 A. In effect, there were emails between Mr. Brown and  
16 Mr. Musacchio that were in the back-up tapes but were not in  
17 the live system, so all of that had been deleted. There were  
18 files that were part of those emails that had been downloaded  
19 that were also deleted. There were emails between Mr. Brown  
20 and Mr. Musacchio in which Mr. Musacchio directs Mr. Brown to  
21 make sure that Mr. Kelly has deleted those files. Then there  
22 is some conversation reported to me by Mr. Brown and Mr. Kelly  
23 both on the day that the lawsuit is filed, or the day after, I  
24 can't remember which one of the two, about whether or not --  
25 Mr. Musacchio is asking them whether they should be deleting

1 emails, and those are the emails that appear to be missing.

2 Q. And do these missing emails -- Well, do you -- If these  
3 emails are missing, isn't it logical that the emails were  
4 deleted by Mr. Musacchio or Mr. Brown or Mr. Kelly?

5 A. Yes, sir.

6 Q. Given the time frame of when those deletions occurred,  
7 would it have been Andy Rosen?

8 A. No, sir. They occurred prior to Mr. Rosen arriving on  
9 scene. The systems were all turned off when he got there.

10 Q. You were also asked by Mr. Ethington about analysis that  
11 may have been done by Deloitte & Touche. Are we relying on  
12 any analysis done by anyone other than the FBI in this case of  
13 digital evidence that was collected?

14 A. Not for our case in chief, no, sir.

15 MR. GREEN: May I have one moment, Your Honor?

16 THE COURT: Yes.

17 MR. GREEN: Thank you, Your Honor. That is all the  
18 questions I have.

19 THE COURT: Mr. Ethington?

20 MR. ETHINGTON: Briefly, Your Honor.

21 REDIRECT EXAMINATION

22 By Mr. Ethington:

23 Q. You have told us, I think, that you are not relying on a  
24 fellow named Loper and a fellow named Cowen's work product in  
25 your investigation and the prosecution of this case. Was that

1 your testimony on cross examination?

2 A. We are not relying on any of the images Mr. Loper made.  
3 Those were all -- They are -- All of them, I believe, were  
4 spares, and there is not anything of evidentiary value on  
5 those. and then we are not relying on any of the analysis  
6 Mr. Cowen did as far as presenting it. Did I listen to him  
7 when he first talked to us about it? Obviously when we first  
8 came in I heard what he had to say and that helped me focus my  
9 attention on the IIS logs first as opposed to checking  
10 somewhere else first on these.

11 Q. Let me interrupt. IS log?

12 A. IIS. That is the internet information server. That is  
13 that web server.

14 Q. Okay. So you did rely on them?

15 A. No, sir. That was basically pointing a direction. I  
16 didn't rely on anything he had done. I independently did that  
17 analysis on there.

18 Q. You determined, though, in your investigation that in the  
19 work done for Exel that Cowen and Loper did a substantial  
20 amount of work, that collection of and mirror imaging and work  
21 on the computer systems of Exel.

22 A. No, sir. Gorgal did the collection; Cowen did the  
23 analysis.

24 Q. Well, but you have seen where Loper was involved in that,  
25 too, that project.

1 A. Yes, sir. There were four -- I think there is 40 some  
2 odd, maybe like 38, something like that, different machines  
3 that were copied, and 4 of which were Mr. Loper. That is less  
4 than ten percent or about ten percent. To me that is not  
5 substantial. But Mr. Cowen did not do any of the imaging, and  
6 Mr. Gorgal didn't really do any of the analysis.

7 Q. Was it Mr. Loper that took the Fifth Amendment many, many  
8 times in questions propounded to him in the courtroom on a  
9 deposition about his activities of mirror imaging and working  
10 in computers?

11 A. In -- Pertaining to the Randall investigation?

12 Q. Yes.

13 A. I believe so, yes, sir.

14 Q. Okay. So a fellow who took the Fifth Amendment had done  
15 ten percent of the work time-wise on the Exel matter.

16 A. Not time-wise. That is computer-wise. He didn't do any  
17 of the big computers. The big computers take longer. But he  
18 also didn't do any of the images that we are looking at or  
19 using in our case.

20 Q. You mentioned Brown and Kelly in your cross examination.  
21 You determined from your investigation, and maybe interviewing  
22 them, since they have entered pleas of guilty, that they  
23 remained in the offices of the places of Exel for a couple of  
24 weeks after they resigned or was fired with access to the  
25 computer systems?

1 A. Well, they had access even if they weren't physically  
2 there because they had the administrator passwords and they  
3 could log in remotely, so technically they had access all the  
4 way up until April whatever it would have been, April 3rd when  
5 they changed the passwords.

6 Q. Right. But they not only had access to these computer  
7 systems at Exel, but they also were physically present for one  
8 week and two weeks after they resigned and were fired.

9 A. There was a period. I am not sure how long. It might  
10 have been two weeks. I don't remember without looking at the  
11 HR records.

12 Q. We talked about Alvarez and Marsal on direct and cross.  
13 Do you have, for the Judge's benefit, the date in which they  
14 handled these back-up tapes that you rely on so heavily?

15 A. That they handed them to us or they got them from?

16 Q. That they got them from.

17 A. I don't have it in front of me. I am sorry, sir. I have  
18 that from elsewhere, but I wasn't expecting to be up here so I  
19 just don't have it.

20 MR. ETHINGTON: May I get that just to refresh his  
21 memory, Your Honor?

22 THE COURT: Yes.

23 MR. ETHINGTON: May I approach?

24 THE COURT: Yes.

25 Q. (BY MR. ETHINGTON) I am handing you this chain of

1 custody document for Alvarez and Marsal that was produced by  
2 the Government.

3 A. Yes, sir.

4 Q. Does that give you the date?

5 A. May 5th, sir.

6 Q. May 5th of?

7 A. 2006, sir.

8 Q. So the computer records that you rely on get into, I  
9 guess you are not familiar with them, but reliable hands, I  
10 will stipulate, in May, May 6th, 2006. Right?

11 A. Sir, again, that is a portion of the computer records we  
12 are relying on. They did not -- For example, Alvarez and  
13 Marsal did not copy the BlackBerry exchange server. They just  
14 used the back-up tapes. They weren't actually down there  
15 copying servers. That was Andy Rosen. That would have been  
16 April 4th. So when you say it got into reliable hands, a  
17 portion of the data got into Alvarez and Marsal's hands on May  
18 5th. A portion of the data, which was collected by Andy  
19 Rosen, got into Andy Rosen's hands on April 3rd and 4th and  
20 5th, whatever day it was in there, April 7th, according to  
21 this, through 9th. A portion of the data was collected at  
22 Exel by G-C Partners between February and April of 2006. They  
23 are all different portions of the data, sir.

24 Q. Yes. This is -- Alvarez and Marsal, they don't have  
25 anything to do with Exel. They did work with TTS. Right?

1 A. Correct, sir. But they didn't copy everything at TTS. I  
2 am pointing out there is -- They are looking at the mail.  
3 Andy Rosen copied everything and did it about a month earlier.  
4 He didn't copy the back-up tapes because, for whatever reason,  
5 that wasn't included on the TRO. So the first time the  
6 back-up tapes come into the hands of a forensic firm would  
7 have been that May 5th, but there are other servers -- For  
8 example, the mail servers themselves were imaged in April.

9 MR. ETHINGTON: May I approach, Your Honor?

10 THE COURT: Yes.

11 Q. (BY MR. ETHINGTON) I am going to hand you a collection  
12 of -- It says Dave -- Dave Cowen on it. Do you see that? And  
13 it is to Rudi. You know Dave Cowen, of course.

14 A. Yes, sir.

15 Q. Do you know who Rudi is?

16 A. I do not, sir.

17 Q. I am trying to think of his last name.

18 A. It says here Peck, but I don't know who that is, sir.

19 Q. Employee of G-C Partners. Okay. What is that on the  
20 front page there?

21 A. It appears to be an email from Rudi Peck to Dave Cowen.

22 Q. Two guys at G-C Partners?

23 A. Yes, sir.

24 Q. Okay. And then the next page it appears to be  
25 attachments to it. Do you see those?



1 A. Yes, sir.

2 Q. Do you recognize them at all?

3 A. I do not, sir.

4 Q. Does it have information on it regarding this case; the  
5 name Mike Musacchio --

6 A. It appears to be, sir. But, again, all of this appears  
7 to be -- Let me have one minute to read this. It appears to  
8 be some kind of an inventory of things that have been provided  
9 to G-C Partners from somebody else. It doesn't necessarily  
10 say where. I am trying to find where.

11 Q. You see those names on there. Those are either  
12 Defendants in this criminal case or persons that were  
13 investigated and not indicted in this criminal case, aren't  
14 they?

15 A. Let me look at all the names. Ms. Fox was never an  
16 unindicted co-conspirator; but the other ones, yes, sir.

17 Q. Okay.

18 A. I don't know what it is, sir.

19 Q. Do you see where it references logs like we have had  
20 testimony about on direct and cross?

21 A. Like referring to the application event logs or system or  
22 security logs?

23 Q. Uh-huh.

24 A. Those are different kind of logs than we were talking  
25 about, sir.

1 Q. Okay. Let's look at the back pages. Are those the type  
2 of logs you were talking about?

3 A. No, sir.

4 Q. Okay. Go one page over. The other way. See where it  
5 says "logs"?

6 A. Again, no. The DHCP would be somewhat relevant, but  
7 those aren't the kinds of ones we are talking about. DHCP  
8 logs would save internally to the network, which computer  
9 internally it was accessing an account.

10 Q. Okay.

11 A. But the I.P. addresses from the time period we are  
12 referring to generally are external. I believe there might  
13 have been some internal while Mr. Brown was still there where  
14 he was looking at the email, but those come straight back to  
15 his computer. You would have to go through the DHCP logs to  
16 get that.

17 Q. Okay. You lost me, but I won't -- Let me show you the  
18 front page, or the second page actually, where it references  
19 Mike Musacchio's desktop and Mike Musacchio's laptop. Do you  
20 see those?

21 A. Yes, sir.

22 Q. And here where the asterisks is in bold print it says,  
23 "Internet history only available for the following two days."  
24 And it is March 26th of '06 and April 10th of '06. That is  
25 for his desktop. And then "Internet history is only available

1 for the following day," and that is April 7th of 2006?

2 MR. GREEN: Your Honor, I am going to object to  
3 this. Mr. Ethington is reading from a document that hasn't  
4 properly authenticated and appears it can't be properly  
5 authenticated by this witness, so I would object to that.

6 MR. ETHINGTON: I am going to ask him just if he  
7 knows what that means.

8 THE COURT: All right. And you have gone way beyond  
9 the scope of the cross, counsel. You need to wrap this up.  
10 You are just starting all over again.

11 MR. ETHINGTON: This will be my last question.

12 THE COURT: All right. Go ahead.

13 THE WITNESS: Sir, I can make an educated guess on  
14 that based on what they are saying, but since I didn't perform  
15 that analysis, nor do I know particularly exactly which ones  
16 they are doing here, this looks to me from this and the fact  
17 that it talks about TTS computers that this is them examining  
18 a copy of the images provided by Andy Rosen. I can't know for  
19 sure because it doesn't say that specifically, but it mentions  
20 TTS computers here so I have to assume that would be the case  
21 when it is talking about TTS computers, and that is the only  
22 place they could have been obtained from.

23 If that is the case, that would match up with what I said  
24 about that there is things that are missing, there is data  
25 that is missing when I looked at it that would tend to

1 indicate things had been deleted.

2 Q. (BY MR. ETHINGTON) In your investigation, did you find  
3 that the internet history for Mike Musacchio was limited?

4 A. I didn't look at the internet history. It wasn't  
5 relevant to what I was looking at.

6 MR. ETHINGTON: That is all we have, Your Honor.

7 THE COURT: Mr. Green, anything else?

8 MR. GREEN: No, Your Honor.

9 THE COURT: Agent, you may step down.

10 THE WITNESS: Yes, sir.

11 THE COURT: Any additional evidence you wish to  
12 present as far as the motion to suppress?

13 MR. ETHINGTON: No, Your Honor.

14 THE COURT: And Mr. Green, Ms. Groves, any evidence  
15 the Government wishes to present?

16 MR. GREEN: No, Your Honor.

17 THE COURT: Mr. Ethington, I will hear from you on  
18 your motion to suppress.

19 MR. ETHINGTON: Very briefly, Your Honor.

20 This is an unusual situation where you have got the  
21 computer forensic analysis people are presently under federal  
22 criminal investigation for--and I am not talking about drunk  
23 driving or something like that--destruction or intentional  
24 manipulation or deletion of electronic evidence. And you can  
25 see that this company that is under investigation is linked

1 and connected directly to all of the entities that are  
2 involved in this case, including the U.S. government.

3 Now, you know, without trying that lawsuit in this  
4 hearing, that should give the Court sufficient pause or  
5 question as to whether or not the evidence that was  
6 accumulated later by the FBI. I am not criticizing the FBI.  
7 I am criticizing the evidence that was produced by these  
8 people and then given to the FBI much later on, a couple of  
9 years later on.

10 You have also gotten a showing that the access and the  
11 storage and the review and the analysis by untrained  
12 people--that is, at the law firms; you heard the testimony  
13 that the agent can't be responsible for the handling or  
14 deleting or reviewing of this electronic evidence before it  
15 gets into a secure place--that is a sufficient showing, and  
16 also that it is unreliable and should not be used in a  
17 criminal proceeding in this context, and we ask that it be  
18 suppressed.

19 THE COURT: Thank you.

20 Mr. Green?

21 MR. GREEN: Your Honor, I only need go back to  
22 Mr. Ethington's filing in this in which he alleges that the  
23 Government participated in the tainting of evidence, which  
24 clearly hasn't been established by Mr. Ethington. In fact,  
25 there is no evidence at all of tainting of evidence in the

1 Government's case. There hasn't been any established here  
2 today.

3 What we hear today is Mr. Ethington has some issues with  
4 how G-C Partners and Ralph Gorgal documented what they did,  
5 but we heard from the FBI that said, number one, that they  
6 looked at the images and they are valid images, they looked at  
7 the data in those images and the data is corroborated by other  
8 sources. There is no indication whatsoever established by the  
9 Defense that there is any tampering or tainting of evidence in  
10 the Government's case.

11 What does the Defense want you to do? They want you to  
12 drag in allegations, unresolved allegations from three years  
13 later that don't even involve Mr. Gorgal, who did the imaging  
14 that the Government is relying on, and try and suggest that  
15 just the mere fact that there is unresolved allegations three  
16 years later in a wholly separate case, that that is enough to  
17 say that the evidence in the Government's case is unreliable.  
18 That has not even -- We are not even close to enough evidence  
19 to even get anywhere near making a finding like that.

20 What Mr. Ethington did well today is try to confuse all  
21 the issues in the case. He is trying to confuse what the  
22 Defendants may have done with evidence to what happened during  
23 the collection of evidence. What the Defendants did to  
24 evidence in this case is going to be heard by the jury. The  
25 jury can hear that. That goes to their guilt, not to whether

1 the evidence is reliable, the evidence that we are left with  
2 after the Defendant's tampering with evidence. It is what we  
3 are left with is the evidence that the jury is going to hear.

4 What Mr. Ethington also tries to do is he also tries to  
5 mix up two separate concepts--analysis with collection of  
6 evidence. The Government is not relying on analysis by  
7 Deloitte & Touche. It is not relying on analysis by G-C  
8 Partners. Analysis is what happens after evidence is  
9 collected. It is the evidence is collected, a copy is made, a  
10 good copy is made so that we can rely on that, and then  
11 somebody looks at it to see what does this evidence mean. We  
12 are not relying on anything anybody else did. The FBI did  
13 that part of the analysis of what the jury is going to hear in  
14 this case. That is of no moment what law firms did, what they  
15 didn't do in analysis. The analysis the jury will hear is  
16 from the FBI.

17 So given all that, I would ask Your Honor to reject the  
18 Defendant's motion to suppress in this case.

19 Thank you.

20 THE COURT: Thank you. Anything else?

21 MR. ETHINGTON: I don't feel like it is necessary,  
22 but the motion was filed -- the motion to suppress was filed  
23 in January of this year based on the amount of evidence we had  
24 available to us at that time and our limited ability to try to  
25 analyze the discovery evidence that was available to us at

1     that time.

2             I am not accusing the Government of tainting the  
3     evidence. I am saying that the Government acquired tainted  
4     evidence in the collection process. That is all we had.

5             Now, we knew that G-C Partners was under contract with  
6     the Government and that they are under investigation by the  
7     Government also. That is all we knew. Now we know a little  
8     bit more about that. But I want it clear, I am not accusing  
9     them of manipulating or tainting the evidence. If the motion  
10    says that, it was poorly written by me.

11            Now, I know they are not relying on analysis done by  
12    these private entities, but they are relying on all of the  
13    collection, supposed preservation, which there wasn't any, and  
14    then the tainting and the manipulation of this evidence. When  
15    you shut down a computer it modifies the entries of the the  
16    electronically stored information. When you turn it back on,  
17    it modifies it. When you scan through it, it modifies it.  
18    And then after all of that activity was done over a period of  
19    months and then some mirror imaging, and then storage for a  
20    few years, it has been tainted. It has been adulterated. It  
21    has been tainted, Judge, and they know it. So what they are  
22    trying to do is get around all of that and try to ignore the  
23    people that are under investigation and their participation in  
24    the gathering of this evidence and the handling of this  
25    evidence, they are trying to ignore it and they are trying to



1     separate themselves from it, and they are trying to start over  
2     again several years after the events have occurred and after  
3     everybody stuck their hand in it, their oar in the water, or  
4     stirring the pot at Thompson & Knight, Strasburger, all the  
5     associates and partners that may have reviewed.

6             And they didn't have any bad intent either. But by doing  
7     this and surveying it, they have tainted it to where it  
8     shouldn't be used in a criminal proceeding at this point.

9             Thank you.

10            THE COURT: Thank you.

11            Well, and I have considered the evidence, I have read the  
12     briefs, the motions filed by the Defendant, the Government's  
13     response, and I don't believe there is any legal basis for  
14     suppressing the evidence the Government intends to produce in  
15     this case. You have not shown anything that the Government  
16     did that, of course, would lead to suppression. You are  
17     relying on some allegations by some third parties, but I think  
18     the Government has shown, at least preliminarily here, that  
19     the evidence is reliable.

20            The issues that you have raised, while they may be issues  
21     for the jury, the fact-finder, it is for the jury. I think  
22     all that goes to the weight.

23            And so the motion to suppress is denied.

24            Why don't we take a break let's take a break until 11:25.  
25     We will come back in and take up the *Daubert* motion, and then

1 we have several motions in limine. We will take those up  
2 then.

3 (Brief recess.)

4 THE COURT: All right. Mr. Ethington let's take up  
5 you -- I guess it would be your supplemental motion on the  
6 *Daubert* hearing.

7 MR. ETHINGTON: Yes, sir. There is a scheduling  
8 situation with the Government's witness, and they suggest that  
9 we might take the motion in limine regarding the Receiver's  
10 report first in order to accommodate a witness.

11 THE COURT: That is fine.

12 Mr. Groves or Ms. Green, who is going to address that?

13 MS. GROVES: Mr. Green will address that, Your  
14 Honor. And I think there has been a change.

15 MR. GREEN: Your Honor, we have Mr. Wills available  
16 to testify if necessary, but I doubt that Your Honor wants to  
17 hear more evidence --

18 THE COURT: Testify on what?

19 MR. GREEN: The motion in limine, the Government's  
20 motion to limine to preclude the Receiver's allegations.

21 THE COURT: The third motion in limine?

22 MR. GREEN: Yes.

23 THE COURT: I think that is what it is called. And  
24 his testimony would go to what?

25 MR. GREEN: Your Honor, his testimony would actually

1 just amplify the testimony that you heard from Agent Lynd, and  
2 that is as to the reliability -- the effort to independently  
3 determine the reliability of the Government's evidence in this  
4 case. But given the fact that you have already heard that  
5 from Agent Lynd, I don't know if it is necessary.

6 THE COURT: And I agree. I don't think that is  
7 necessary. And then, frankly, I don't know -- I think the  
8 issues of reliability in terms of the evidence that you are  
9 relying on in your case in chief, as I stated earlier, that  
10 goes to the jury. They are raising some issues with that.  
11 Those are issues for the jury. But I don't know that that is  
12 the basis for whether or not to admit these allegations that  
13 are being raised in this the SEC versus Randall. I think  
14 those are really kind of separate issues. I will hear from  
15 you on that, but you are right. I don't need to hear any  
16 additional evidence.

17 MR. GREEN: So with the Court's permission, if we  
18 can excuse Mr. Wills.

19 THE COURT: Yes. Mr. Wills, you may be excused.  
20 Thank you.

21 MR. GREEN: Your Honor, our argument is  
22 essentially -- has several points. One is there is  
23 questionable relevance of the Receiver allegation in the  
24 Government's case, and I say that because the -- because the  
25 Government's evidence is independently reliable, or has been

1 shown to be reliable with independent sources, and the lack of  
2 any allegations specifically about any kind of corruption or  
3 taint or anything wrong with the Government's evidence. I  
4 know Mr. Ethington is arguing that people have access. That  
5 is not specific evidence of taint. So absent evidence of  
6 taint in the Government's case, it makes allegations three  
7 years later involving other people at G-C Partners less  
8 relevant. Also the fact that that hasn't been resolved makes  
9 it less relevant.

10 As Your Honor well knows from the motions that you have  
11 heard yesterday and what the Government has been saying all  
12 along about the Receiver allegations, is that the Government  
13 had serious questions about the conclusions made by the  
14 Receiver's expert, which is really the basis of the  
15 allegations.

16 So that leads me to the next point of why Your Honor  
17 should preclude the evidence of the Receiver's allegation in  
18 the Government's case, and that is that to allow that in the  
19 Government would have to litigate that entire issue in front  
20 of our jury on an unrelated case, which is our 403 -- Federal  
21 Rule of Evidence 403 argument, is that it is going to confuse  
22 the jury, it is going to take an incredible amount of time on  
23 some unrelated matter, and it is likely never going to get  
24 resolved to the satisfaction of anybody under these  
25 circumstances. That investigation should run its course and

1 it shouldn't be litigated in our case.

2 So that is in essence what the Government's argument is  
3 on the motion in limine is that it is marginally -- it is very  
4 suspect, the relevance of that evidence, and the fact that  
5 there is no taint alleged in our case, and the fact that it is  
6 going to be an incredible messy litigation of something  
7 unrelated to our case in our case.

8 THE COURT: Thank you.

9 Mr. Ethington?

10 MR. ETHINGTON: Well, Your Honor, if it is messy,  
11 this Court is used to seeing messy evidence presented, if it  
12 is done in an expeditious fashion and it assists the jury in  
13 evaluating evidence or testimony gathered by G-C Partners in  
14 this case.

15 Now, they would like to just ignore the fact that this  
16 Cowen and Loper participated in the gathering of this evidence  
17 in this case. Now, if we have evidence available to us that  
18 would impeach their credibility and their methodology and the  
19 way that they conducted business generally --

20 THE COURT: And would credibility be an issue? I  
21 expect Mr. Loper and Mr. Cowen aren't going to be witnesses  
22 for the Government.

23 MR. GREEN: That is correct, Your Honor.

24 THE COURT: They aren't going to be here, so there  
25 is no credibility -- As far as their credibility of witnesses,

1       there is nothing to attack.

2               MR. ETHINGTON: But their evidence is going to be  
3 here, and that is my obligation.

4               THE COURT: Well, Mr. Cowen, the testimony was he  
5 didn't collect, he didn't make any images, he didn't collect  
6 any evidence. He made an analysis. They aren't going into  
7 that analysis. They aren't going to present that to the jury.  
8 Mr. Loper imaged, apparently, about four computers, and they  
9 aren't using those images. They aren't using that evidence,  
10 if my understanding is correct.

11              MR. GREEN: That is correct, Your Honor.

12              THE COURT: So they aren't using that evidence in  
13 this case. They aren't relying on that evidence and they are  
14 not relying on Mr. Cowen's analysis, his conclusions in order  
15 to present their case. So what is it that you are impeaching,  
16 then, or attempting to attack or to impeach?

17              MR. ETHINGTON: The gathering of the evidence. We  
18 are both at a disadvantage here this morning, Your Honor,  
19 because we have just received a couple of days ago, both of  
20 us, the invoices that G-C Partners submitted for their work on  
21 this case, on the Musacchio case, and in those invoices for  
22 time spent it lists Cowen and Loper. Now, there is one month  
23 missing that we have to go back and revisit.

24              THE COURT: But that is pretty broad. They have  
25 acknowledged that Mr. Cowen has made analysis, and they have

1      acknowledged that Mr. Loper examined computers, so you would  
2      expect entries. Are you disputing that that is the extent of  
3      their involvement?

4                    MR. ETHINGTON: Yes. I think that these invoices  
5      will show that it was more extensive than that. I think the  
6      evidence might show it is more extensive than that. And I am  
7      not accusing them of minimizing it. I am saying they didn't  
8      have the benefit of these invoices either until two days ago.

9                    THE COURT: And are you also, then, disputing their  
10     statements and their position that they are not relying on the  
11     images that were made or collected or gathered by Mr. Loper?

12                   MR. ETHINGTON: Yes.

13                   THE COURT: And that they are not relying on the  
14     analysis by Mr. Cowen. So you are disputing the position that  
15     they are not relying --

16                   MR. ETHINGTON: Sort of, Judge. I am kind of  
17     disputing it by this. They are relying on the raw evidence  
18     that was available to Cowen and Loper in the critical part of  
19     the investigation, their investigation. Actually it was the  
20     civil investigation that gave life to this criminal  
21     investigation. And they were there. They were on-site. And  
22     they have been accused, reasonable suspicion --

23                   THE COURT: You say "they," but, again, that is  
24     painting broadly. Who has been accused is Mr. Loper and  
25     Mr. Cowen, and they are saying, "We are not using any of their

1 product."

2 MR. ETHINGTON: Well, G-C Partners.

3 THE COURT: Well, but G-C Partners because of the  
4 actions of Mr. Loper -- It has to be individuals that are  
5 engaged in the misconduct, and the individuals are Mr. Loper  
6 and Mr. Cowen. Those are the allegations. And the Government  
7 is saying in this case, "We are not using any of their work  
8 product, any images that Mr. Loper may have collected and any  
9 analysis done by Mr. Cowen. We are just not using that as our  
10 case in chief. That is not our case."

11 MR. ETHINGTON: They aren't using the work product  
12 of those two individuals, but they are using the evidence that  
13 those two individuals had access to.

14 THE COURT: So what if they had access to it?  
15 Mr. Cowen may have had access to it to reach his analysis, but  
16 they -- ultimately they are not relying on his analysis. That  
17 doesn't taint anything. They are not relying on that. The  
18 evidence was, the testimony, that those copies were made and  
19 then work copies were made, and that is what the work was done  
20 off of. The subsequent work was performed using those work  
21 copies.

22 And then Mr. Loper, he imaged certain computers, but the  
23 Government says, "We are not using those images here. That is  
24 not part of our case in chief. That is not part of our  
25 allegations. It is not part of the evidence against your



1 client."

2 So what is there to attack? If that is true, what is  
3 there to attack? Other than you are wanting to make an issue  
4 out of it, but if that is true, what are you attacking, then?  
5 If you are not using Loper's images, they are not using  
6 Cowen's analysis --

7 MR. ETHINGTON: Judge, I think if the evidence is  
8 fully presented -- And I am not trying to litigate some case  
9 with the SEC --

10 THE COURT: But that is what we will wind up getting  
11 into it.

12 MR. ETHINGTON: All I am trying to do is show that  
13 -- and I respectfully submit to the Court here that if we show  
14 to a reasonable jury that the raw data, the evidence was  
15 accessed and made available --

16 THE COURT: When you say "raw data," what are you  
17 referring to?

18 MR. ETHINGTON: The Exel computer system.

19 THE COURT: Okay. The ones that were imaged back in  
20 '06.

21 MR. ETHINGTON: Yes. And before it was imaged.

22 THE COURT: Right. You can go into that. You have  
23 already raised the issues here that Kelly and Musacchio were  
24 there and, of course, the Government acknowledged they had  
25 access to it even after they were gone, and so what could have

1 happened between -- during that time and then '06 when they  
2 were imaged, those are still there without getting into the  
3 SEC.

4 MR. ETHINGTON: I think it is going to be important  
5 for this jury to know the quality of the evidence and how it  
6 was handled, how it was gathered. That is real critical --

7 THE COURT: I agree with that, and you can certainly  
8 go into that in terms of what they did, but that is going to  
9 be Mr. -- What is his name?

10 MR. GREEN: Gorgal.

11 THE COURT: Mr. Gorgal. That is the witness that  
12 the Government is relying on, the individual, he gathered or  
13 imaged made those images, they are relying on that evidence.  
14 So what he did, how he gathered, of course that is proper for  
15 cross examination and for you to question before the jury.  
16 But none of that gets you into the SEC lawsuit.

17 MR. ETHINGTON: My perception of Mr. Gorgal's  
18 position with G-C Partners as it relates to Exel and the law  
19 firms, and then Cowen and Loper and another staff of people,  
20 was that Gorgal was really what I will call the account  
21 representative to the client, and that the hands-on work was  
22 done primarily by Cowen, Loper, and a staff of people. I  
23 think that is what the evidence would indicate.

24 THE COURT: How are you proposing to get that  
25 evidence before the jury? Through the findings of the

1 individual? Who is the individual that we have been fighting  
2 over the subpoena?

3 MR. GREEN: Mr. Fogarty.

4 THE COURT: Yes. His report. How are you planning  
5 on getting into that there are allegations as to tampering and  
6 tainting evidence?

7 MR. ETHINGTON: The allegations?

8 THE COURT: Yes. The allegations in the SEC's suit  
9 that the Receiver is making against Mr. Loper and Mr. Cowen.  
10 How are they planning on presenting that to the jury?

11 MR. ETHINGTON: Through the partner Mr. Gorgal.

12 THE COURT: Just ask him whether they are under  
13 investigation?

14 MR. ETHINGTON: Yes.

15 THE COURT: All right. And you see that as relevant  
16 in attacking the credibility.

17 MR. ETHINGTON: Yes. Of the entire investigation,  
18 because they handled the evidence. I think that testimony  
19 will show that.

20 And I think the jury has a right to hear, you know, the  
21 quality of the work that was done at the inception of the  
22 case --

23 THE COURT: I agree with that, but that doesn't get  
24 you into the SEC lawsuit necessarily.

25 MR. ETHINGTON: I guess I am misunderstanding and I

1 apologize.

2 THE COURT: I am not understanding you, then.

3 MR. ETHINGTON: I don't plan on litigating this SEC  
4 case, but I do think the Government has a -- I mean the jury  
5 has a right and the Defendant has a right to let the jury know  
6 how this evidence was accumulated, and by whom, and what those  
7 people -- what their methodology is, what they do, because it  
8 is real critical --

9 THE COURT: And if the Government says "The one we  
10 are relying on is from Mr. Gorgal," then you can get into what  
11 he did, what methodology he used, and whether that was  
12 appropriate or not. I think that is fair questioning, and you  
13 will be entitled to do that. But I don't know how that gets  
14 you into the SEC lawsuit, if you are questioning Gorgal,  
15 because that is the evidence that they say they are relying  
16 on.

17 THE COURT: I don't plan on making the SEC pleadings  
18 like an exhibit, or something like that. I do plan on  
19 developing testimony, though, about the methodology of the  
20 people that worked with Gorgal and they worked on this case.  
21 And they had questioned --

22 THE COURT: I think you can do that. But then  
23 somewhere in there you want to get into the SEC allegations  
24 and then bring up the fact that they are being -- facing these  
25 allegations and being investigated.

1 MR. ETHINGTON: By the FBI; not the SEC.

2 THE COURT: It is in the SEC lawsuit but the FBI,  
3 that they are being investigated and those allegations arose  
4 out of that.

5 MR. ETHINGTON: There is a ongoing case going on.

6 THE COURT: Is this 608? You know, it is not a  
7 criminal conviction.

8 MR. ETHINGTON: Bad acts, yes.

9 THE COURT: Bad acts. And, of course, 608 states  
10 that extrinsic evidence is not admissible. All you can do is  
11 cross examine them on it and then that is it. And so that is  
12 all you are planning on doing?

13 MR. ETHINGTON: Yes.

14 THE COURT: And even if they don't testify, you  
15 think that that would be admissible and relevant under 608?  
16 Because that is generally going to attacking the credibility  
17 of a witness of somebody who has testified, and I think 608 by  
18 its terms talks about that.

19 MR. ETHINGTON: Yes, it does.

20 THE COURT: And they are not going to be witnesses  
21 here.

22 MR. ETHINGTON: It means the evidence really; not  
23 just a particular witness. I mean, if I am not allowed to  
24 test the reliability of this --

25 THE COURT: No. You are painting too broad of a

1 brush. I am not saying you are not allowed. I am saying you  
2 are not allowed to bring in this evidence about Receiver  
3 allegations against these two individuals in the SEC lawsuit.  
4 You can test it. There are other ways of testing, like we  
5 have discussed. You can certainly test what was done. But I  
6 am saying the question is are you going to be entitled to test  
7 it by bringing in evidence of these allegations of this  
8 investigation. That is the only issue we are dealing with.  
9 And you are trying to make this into, "Well, I am not allowed  
10 to test it." Of course you will be allowed to test what they  
11 did. The issue is will you be allowed to test it by  
12 questioning on these allegations. That is the issue that we  
13 are dealing with.

14 MR. ETHINGTON: And not to transition into the  
15 *Daubert* issue, but it kind of relates, it is intertwined, and  
16 that is if they are going to present Gorgal as an expert,  
17 which I think their filings indicate, in some capacity --

18 THE COURT: The imaging, because he did the imaging.

19 MR. ETHINGTON: I think that is it. But --

20 THE COURT: So they are going to get into what he  
21 did and then the methods, and you are entitled to question on  
22 that.

23 MR. ETHINGTON: Well, and the work product of the  
24 people that give him --

25 THE COURT: If there is such a thing, sure.

1 MR. ETHINGTON: If there is linkage between him and  
2 his work and Cowen and Loper, which I believe the evidence  
3 will end up showing.

4 So we would ask that this motion in limine either be  
5 denied or carried until we can figure out precisely, you know,  
6 some playing field here. I don't want to step out of bounds.

7 THE COURT: I think that is the way to do it. I am  
8 not going to deny it. I am not convinced yet that that, in  
9 fact, is relevant and that that is proper. The only way that  
10 I see it coming in would be through Rule 608. The Government  
11 is saying they are not going to call those witnesses, and so  
12 once the evidence is developed, because you say that there is  
13 going to be evidence of a tie-in, they are saying they are not  
14 relying on their work product, but you are saying there is  
15 going to be evidence of that, then maybe we can revisit it at  
16 that point.

17 But I will grant it to the extent of don't go into that  
18 issue, then, before the jury until you get a ruling that that  
19 is admissible.

20 MR. ETHINGTON: Yes. I agree with that ruling, Your  
21 Honor, because I think we don't know -- we can't predict the  
22 development of the evidence here.

23 THE COURT: Certainly. And I don't know all the  
24 evidence as well as the attorneys know it. I know what I have  
25 heard today and over the last few days when we have had

1       hearings. So I will carry that along, and then we can make a  
2       decision when the time comes.

3               What about the *Daubert* motion? That is your motion.

4               MR. ETHINGTON: *Daubert* was filed in January also.

5               THE COURT: And that went to a different witness  
6       than one you are raising now.

7               MR. ETHINGTON: Judge, kind of a review, it looks  
8       like we have co-Defendant Brown who pled guilty quite some  
9       time ago as the designated expert at first. That prompted our  
10      *Daubert* motion because we didn't know about his credentials.

11              And then there was designations through the course of  
12      time of others Gwendelyn Dove, for instance, who works at the  
13      lab. I will call it the FBI lab, although they are only a  
14      participant. And then Agent Lynd, and then Gorgal, and then  
15      Wills, the fellow who was just excused. And probably by  
16      memory I am leaving one out, maybe.

17              MS. GROVES: Jackie Northrup, Your Honor.

18              MR. ETHINGTON: Thank you. Who is also a computer  
19      expert?

20              MS. GROVES: No. She is a lab tech at the regional  
21      forensic computer lab. She did imaging or copying.

22              MR. ETHINGTON: So I haven't been able to determine  
23      adequately who is going to testify on behalf of the Government  
24      as an expert and in what capacity, because we have got the 701  
25      layperson with an opinion, and then 702 expert in a certain



1 area.

2 And we have heard today even the division of these  
3 different areas of expertise; somebody is an expert maybe of  
4 collecting data, and that is all they did or do, and then  
5 somebody is an expert in the area of analyzing that data and  
6 they don't do any collecting.

7 And boiling that all down, then, I would like the *Daubert*  
8 motion to be considered by the Court as a request to restrict  
9 the testimony really of Agent Lynd. If he -- I don't think he  
10 has testified that he has the credentials to be a forensic  
11 analyst of data.

12 THE COURT: That wasn't an issue at that suppression  
13 hearing, so nobody went into that.

14 MR. ETHINGTON: Well, he mentioned on-the-job  
15 training and then some courses that he had taken. And you are  
16 right. I didn't flesh that out.

17 THE COURT: Nobody developed that fully.

18 MR. ETHINGTON: But in the area of expertise, if  
19 there is, of imaging, I guess, collecting data from --

20 THE COURT: And are you seeking a hearing on all of  
21 these individuals outside the jury before they testify, or are  
22 you wanting to object once the Government lays a predicate and  
23 then you don't think it is sufficient and we can take it up  
24 then, or what are you proposing?

25 MR. ETHINGTON: Candidly, I think the best way to do

1     it is if we can narrow it down and get not a commitment 100  
2     percent, but a firm idea of who the designated experts are  
3     going to be, because we have this list right now and it sounds  
4     like some of those witnesses would be duplication of others,  
5     if we could identify that, and then the area of their  
6     testimony, because if Agent Lynd testifies as an expert in the  
7     gathering of evidence, we would agree with that. But if he is  
8     going to do the computer analysis testimony, we would contest  
9     that.

10           THE COURT: Well, why don't you --

11           Ms. Groves, I will hear from you.

12           MS. GROVES: Your Honor, we filed a notice of expert  
13     witnesses or witnesses with expertise, Document No. 55. We  
14     drew an objection from Defendant Kelly concerning the notice  
15     with respect to Special Agent Lynd. That was amended at that  
16     point to further flesh out what Agent Lynd would be testifying  
17     to. So the Government has put the Defense on notice of who  
18     our witnesses are and what they will be testifying to.

19           In addition to the ones that Mr. Ethington has mentioned,  
20     and I believe I also added the name of Jackie Northrup, the  
21     Government has listed Andrew Rosen as an expert witness and  
22     Levi Richardson, but we have also described what type of  
23     testimony they will be asked for at trial, the areas of that  
24     testimony.

25           THE COURT: All right. Mr. Ethington, why

1 don't -- Were you finished? I didn't mean to cut you off.

2 MS. GROVES: I am, Your Honor.

3 THE COURT: Get with the Government, then, if you  
4 need some clarification or try to establish what it is that  
5 you are trying -- where are you are trying to go and see where  
6 you are trying to go.

7 MR. ETHINGTON: Judge, I am not trying to be  
8 difficult about this, and I am not criticizing their filings,  
9 but as an example on page 2 of some -- Document No. 123, it  
10 says the Government will not offer Mr. Gorgal as an expert  
11 witness concerning forensic examinations other than his  
12 imaging. So I guess he can be an expert in imaging and not in  
13 the examination. And that is what I am referring to. I know  
14 they have written it clearly, but I am not able to decipher it  
15 clearly yet.

16 THE COURT: Okay. Well, why don't -- work on that,  
17 and get with the Government if you need some clarification.  
18 There is multiple filings I think that have been made  
19 regarding, as the motions have been filed, regarding these  
20 witnesses. See if you can get that cleared up, and then let  
21 me know what it is that you are needing.

22 MR. ETHINGTON: We will. Thank you.

23 THE COURT: Any other motions then, Mr. Ethington,  
24 that you filed that we need to address here?

25 MR. ETHINGTON: No, Your Honor. There is two

1 motions in limine filed by the Government I think that are  
2 still pending.

3 THE COURT: I was going to them next.

4 Ms. Groves or Mr. Green, anything else that we need to  
5 address here?

6 MS. GROVES: We had a motion in limine that I  
7 believe has been withdrawn, Your Honor. That is the one to  
8 limine out the Thompson & Knight report. I believe that was  
9 done at a bench conference.

10 There is also a motion in limine to preclude introduction  
11 of the civil settlement, the facts of the civil settlement  
12 without first approaching the Court on that.

13 THE COURT: Any objection to that? That would seem  
14 to be generally not admissible.

15 MR. ETHINGTON: No, Your Honor.

16 THE COURT: I will grant that motion in limine.

17 MS. GROVES: And I believe we have already dealt  
18 with the situation involving keeping out the SEC, and we  
19 understand that is going to be a carried motion.

20 Then the final motion in limine that the Government filed  
21 was the one wanting to limine out extrinsic evidence of the  
22 counterclaim filed by Tax Credit Services, LLC against  
23 Defendant Joseph Roy Brown in state court in Tennessee.

24 THE COURT: Were you intending to get into that  
25 issue, Mr. Ethington?

1 MR. ETHINGTON: Yes, Your Honor.

2 THE COURT: You were?

3 MR. ETHINGTON: Yeah, that is similar or like  
4 conduct alleged against Brown and expecting that he would be a  
5 witness.

6 THE COURT: Okay. Ms. Groves?

7 MS. GROVES: The basis for the Government's motion  
8 in limine is that he has not been convicted. It is a civil  
9 lawsuit that is currently ongoing in Tennessee. And under  
10 Rule 609 -- Am I quoting the right rule? I think it is  
11 608(b). That shouldn't come in, the extrinsic evidence should  
12 not. If Mr. Brown is on the stand, I am assuming, then, that  
13 he would be subject to cross examination. But to call  
14 witnesses in that civil lawsuit or to introduce pleadings in  
15 that civil lawsuit should be precluded under 608(b).

16 THE COURT: Mr. Ethington?

17 MR. ETHINGTON: And 608(b) says that it ordinarily  
18 may not be admissible, but in the discretion of the Court.  
19 However, in the discretion of the Court, if it is probative of  
20 truthfulness or untruthfulness, it can be inquired upon or  
21 into on cross examination of the witness.

22 THE COURT: Right. But it does state that extrinsic  
23 evidence is not admissible, but you can inquire of the  
24 witness. But she is correct that the rule prohibits using  
25 extrinsic evidence, so you wouldn't be --

1 MR. ETHINGTON: I am not going to bring the  
2 pleadings in.

3 THE COURT: Any of those kinds of documents, that  
4 would not be admissible without getting a specific ruling from  
5 the Court. When it comes time to cross examine him on that,  
6 just let me know before you get into that.

7 MR. ETHINGTON: Yes, Your Honor.

8 THE COURT: All right. Anything else?

9 MS. GROVES: There is only one other outstanding  
10 motion, Your Honor. Apparently the Eastern District of Texas  
11 and the Receiver Ms. Cook have entered into an agreement about  
12 how to handle the SMART disk. The Government had filed a  
13 motion to compel a copy from the RCFL, and as a result of the  
14 agreement being reached between the Receiver and the Eastern  
15 District, and based on the understanding that I will be  
16 provided a copy of that so that I can, in turn, provide it to  
17 Mr. Ethington in supplemental discovery, we will withdraw that  
18 particular motion.

19 THE COURT: Okay. All right.

20 Anything else, then, that we need to address?

21 MR. ETHINGTON: On that SMART disk, we have heard  
22 some testimony about the SMART disk. They are tools you stick  
23 in a computer so you can do this imaging, I guess, and  
24 whatever all they do with it electronically. Is there some  
25 idea of time frame on that? Because we are --

1 THE COURT: Do we have --

2 MS. GROVES: Ms. Cook could perhaps address that. I  
3 believe the agreement with the Eastern District is fairly  
4 recent, and I would have to ask her because I have no other  
5 information on that.

6 THE COURT: Ms. Cook, any information on that? He  
7 wants to know a time frame as to when he might be able to  
8 receive that evidence.

9 MS. COOK: As quickly as possible. We will get a  
10 motion to Judge O'Connor and ask him to rule on an expedited  
11 basis. And we recognize the Defense need for this as quickly  
12 as possible, and you have my word I will do that.

13 THE COURT: When do you think you will file a motion  
14 with Judge O'Connor?

15 MS. COOK: It depends on how long we are today, but  
16 today or tomorrow.

17 THE COURT: Today or tomorrow will be fine, and then  
18 hopefully in the next few days you can get your copy.

19 MR. ETHINGTON: Okay. So they have got to have an  
20 order. I thought they had an agreement, so they can get it  
21 done today or tomorrow, but --

22 THE COURT: You might want to speak with the  
23 Receiver about that when we break here. But she is trying to  
24 do it as fast as she can, so maybe you can work something out  
25 there.

1 MR. ETHINGTON: Thank you.

2 THE COURT: Anything else?

3 MS. GROVES: No, Your Honor.

4 THE COURT: Mr. Ethington?

5 MR. ETHINGTON: No.

6 THE COURT: Thank you. And Court is adjourned I  
7 guess, unless I hear from you and we need a hearing, until the  
8 pretrial conference sometime before the trial.

9 Let me ask the lawyers to come up here a minute.

10 (The following was had at the bench.)

11 THE COURT: The case is currently set on a two-week  
12 docket on September the 17th. I have an Abilene docket  
13 September the 17th. I had to move it from this month. So we  
14 will start it on the 24th. So just plan on that, a week  
15 later. So we will --

16 MR. ETHINGTON: No objection.

17 THE COURT: I think the pretrial conference will  
18 likely be the same, but I will look at the date. I don't  
19 think that will change. So we will just see you all here at  
20 the pretrial conference and take up some of these issues we  
21 left --

22 MR. ETHINGTON: I think we can work together on it.

23 THE COURT: Okay. Thank you.

24 (End of hearing.)

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I HEREBY CERTIFY THAT THE FOREGOING IS A  
CORRECT TRANSCRIPT FROM THE RECORD OF  
PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.  
I FURTHER CERTIFY THAT THE TRANSCRIPT FEES  
FORMAT COMPLY WITH THOSE PRESCRIBED BY THE  
COURT AND THE JUDICIAL CONFERENCE OF THE  
UNITED STATES.

S/Shawn McRoberts 09/12/2012  
\_\_\_\_\_  
DATE  
SHAWN McROBERTS, RMR, CRR  
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